Duquesne Law Review

Volume 43 | Number 2 Article 11

2005

The Employee Retirement Income Security Act Preempts State Law Causes of Action against ERISA-Regulated Benefit Plans: *Aetna Health, Inc. v. Davila*

Lisa M. Schonbeck

The Employee Retirement Income Security Act Preempts State Law Causes of Action Against ERISA-Regulated Benefit Plans: *Aetna Health, Inc. v. Davila*

EMPLOYMENT LAW – EMPLOYEE RETIREMENT INCOME SECURITY ACT – EMPLOYEE BENEFIT PLANS – FEDERAL PREEMPTION – The Supreme Court of the United States held that ERISA preempts a Texas state law allowing claims against ERISA-regulated employee benefit plans for denial of coverage.

Aetna Health Inc., v. Davila, 124 S. Ct. 2488 (2004)

In 1974, Congress enacted the Employment Retirement Income Security Act (ERISA) to ensure uniform regulation of all employee-benefit plans.[1] To facilitate this purpose, ERISA contains extensively crafted preemption provisions, which guarantee exclusive federal jurisdiction over employee-benefit plan regulation.[2] Respondents Juan Davila (hereinafter "Davila") and Ruby Calad (hereinafter "Calad") brought suit against their respective ERISA-regulated employee benefit plans for violations of the Texas Healthcare Liability Act (THCLA).[3] Specifically, Davila and Calad alleged that their respective benefit plans failed to exercise ordinary care in making certain coverage decisions.[4]

---

1. Aetna Health Inc. v. Davila, 124 S. Ct. 2488, 2495 (2004). *See also* Employee Retirement Income Security Program, 29 U.S.C. §§ 1001-1461 (1998). § 1001(b) provides, in relevant part:

> It is hereby declared to be the policy of this chapter to protect . . . the interest of participants in employee-benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee-benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts.

29 U.S.C. §§ 1001-1461 (1998).

2. *Aetna*, 124 S. Ct. at 2495 (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)). *See also* 29 U.S.C. § 1144.

3. TEXAS CIV. PRAC. & REM. §§ 88.001-88.003 (2004 Supp. Pamphlet).

4. *Aetna*, 124 S. Ct. at 2493.

Davila, a participant[5] in an employee health benefit plan administered by Aetna Healthcare, received a prescription for Vioxx from his treating physician for arthritis pain; however, Aetna refused to cover the medication.[6] Rather than purchasing Vioxx and suing Aetna for reimbursement, Davila opted to use Naproysn, a substitute for Vioxx, from which he claimed to suffer a severe reaction requiring hospitalization.[7] Calad, a beneficiary[8] of a healthcare plan administered by CIGNA Healthcare, endured a hysterectomy requiring rectal, vaginal and bladder repair.[9] Although her treating physician recommended an extended hospital stay, a CIGNA discharge nurse informed her that CIGNA would cover only a one-day stay.[10] Calad subsequently suffered complications, requiring her to return to the hospital; thus, she alleged CIGNA's failure to cover the extended stay proximately caused her post surgery complications.[11]

Davila and Calad brought their respective suits in Texas state court under THCLA § 88.002,[12] claiming that Aetna and CIGNA failed to exercise ordinary care in making their treatment decisions, thereby proximately causing their injuries.[13] Arguing that Davila and Calad's causes of action fit within the scope of, and were completely preempted by, ERISA § 502(a), Aetna and CIGNA removed Davila and Calad's cases to federal district courts.[14] In holding that ERISA § 502 (a) preempts Davila and Calad's state causes of action, the respective district courts refused to remand

5. A participant is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employers or members of such organization." 29 U.S.C. § 1002(7).

6. *Aetna*, 124 S. Ct. at 2493. The Supreme Court decided Davila's case on June 21, 2004, approximately three months prior to Merck's Vioxx recall due the drug's link with increased risk of heart attack, stroke, and other cardiovascular problems. *See* Marc Kaufman, *Merck Withdraws Arthritis Medication: Vioxx Maker Cites Users' Health Risks*, THE WASHINGTON POST, October 1, 2004, at A1.

7. *Aetna*, 124 S. Ct. at 2493.

8. A beneficiary is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8).

9. Roark v. Humana, 307 F.3d 298, 302 (5th Cir. 2002).

10. *Aetna*, 124 S. Ct. at 2493.

11. *Id.*

12. The Texas Civil Code states, "A health insurance carrier, health maintenance organization, or other managed care entity ... has the duty to exercise ordinary care when making health care treatment decisions and is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care." TEXAS CIV. PRAC. & REM. §§ 88.002(a) (2004).

13. *Aetna*, 124 S. Ct. at 2493.

14. *Id. See also* 29 U.S.C. § 1132(a).

the cases to state court.[15] Davila and Calad each opted not to amend their complaints to bring claims under ERISA; thus, the respective district courts dismissed the complaints with prejudice.[16] Davila and Calad both appealed the district courts' refusal to remand their respective cases to state court.[17]

The Fifth Circuit Court of Appeals consolidated Davila and Calad's actions with multiple other district court actions that all considered whether ERISA preempted Texas state law negligence claims against the parties' respective benefit plans.[18] In its analysis of Davila and Calad's claims, the Fifth Circuit noted that ERISA provides for complete preemption[19] under § 502(a) and conflict preemption under § 514.[20] The court of appeals then determined that Davila's and Calad's claims could only arise under either § 502 (a)(2) or § 502(a)(1)(B), neither of which, the court concluded, preempted Davila and Calad's state causes of action.[21] The Fifth Circuit relied on the United States Supreme Court decision in *Pegram v. Herdrich*[22] in classifying Davila and Calad's claims as those involving "mixed eligibility and treatment decisions."[23] As a result of this classification, the appellate court concluded the claims were not fiduciary in nature under § 502(a)(2) and thus not completely preempted by that section of ERISA.[24] With respect to § 502(a)(1)(B), the court of appeals held, in reliance on *Pilot Life Insurance Co. v. Dedeaux*[25] and *Rush Prudential HMO, Inc. v.*

15. *Aetna*, 124 S. Ct. at 2493.

16. *Id.* When a court dismisses a complaint "with prejudice," the complainant "is foreclosed from filing a suit again on the same claim or claims." BLACK'S LAW DICTIONARY 482 (7th ed. 1999).

17. *Aetna*, 124 S. Ct. at 2493.

18. *Roark*, 307 F.3d at 302.

19. Complete preemption occurs when a federal statute's preemptive force is "so extraordinary and all-encompassing that it converts an ordinary state-common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." BLACK'S LAW DICTIONARY 279 (7th ed. 1999).

20. *Roark*, 307 F.3d at 305. *See* 29 U.S.C. §§ 1132(a), 1144. *See also* Giles v. NYLCare Health Plans, Inc., 172 F.3d 332 (5th Cir. 1987).

21. *Roark*, 307 F. 3d at 306. *See* 29 U.S.C. § 1132(a)(2) (providing for civil action against a plan fiduciary for breach of fiduciary duty) *and* § 1132 (a)(1)(B) (providing a cause of action for benefits erroneously denied to a plaintiff).

22. 530 U.S. 211 (2000).

23. *Roark*, 307 F.3d at 307. The *Pegram* court explained that HMOs make eligibility decisions to determine whether the particular treatment is covered under the plan; treatment decisions about how to treat a patient's condition; and mixed eligibility and treatment decisions, which determine whether one treatment option is better suited and needed immediately. *Pegram*, 530 U.S. at 228. *Pegram* held that claims falling under "mixed eligibility and treatment decisions" do not fall with § 502(a)(2). *Id.*

24. *Roark*, 307 F.3d at 307-08.

25. 481 U.S. 41 (1987).

Moran,[26] that because neither Davila nor Calad's claims duplicated the causes of action enumerated in ERISA § 502(a)(1)(B), ERISA could not completely preempt their state law causes of action.[27]

The United States Supreme Court granted certiorari[28] to determine whether the "interlocking, interrelated, and interdependent remedial scheme" of ERISA § 502(a) completely preempted the causes of action claimed by Davila and Calad under the THCLA.[29]

Justice Thomas wrote the majority opinion for the unanimous Court.[30] Part II, Subpart A[31] of the opinion addressed the issue of whether Davila and Calad's causes of action arose under federal law for purposes of removal under 28 U.S.C. § 1441.[32] Under the "well-pleaded complaint rule," a cause of action arises under federal law only when the plaintiff clearly pleads a federal claim in his complaint.[33] The Court noted that a cause of action cannot be found to arise under federal law only on the basis of an anticipated federal defense.[34] However, Justice Thomas explained an exception to the well-pleaded complaint rule: Removal of a state claim is proper when the federal statute "wholly displaces the state law cause of action through complete preemption" because, in such instances, the state claim comes within the scope of the federal statute, even if the plaintiff bases her complaint solely on state law.[35] Based on this exception, the Court asserted that

---

26. 536 U.S. 355 (2002).

27. *Roark*, 307 F.3d at 310-11.

28. Certiorari is "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review." BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

29. *Aetna*, 124 S. Ct. at 2492. Neither Aetna nor CIGNA argued on appeal that Davila and Calad's claims fell under § 502(a)(2) and the Court determined they could resolve the case "entirely by reference" under § 502(a)(1)(B); thus, the Court did not address § 502(a)(2). *Id.* at 2494 n.1.

30. *Id.* The majority opinion included Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy and Souter. Justice Ginsburg wrote a concurring opinion, in which Justice Breyer joined. *Id.*

31. *Id.* at 2494. Part I of the opinion includes a recitation of the facts and procedural history of Davila and Calad's cases. *Id.* at 2493.

32. *Id.* The court of appeals decided this issue in the affirmative before determining that ERISA does not preempt Davila and Calad's causes of action. *Roark*, 307 F.3d 304-05. Nevertheless, the Supreme Court analyzed this issue in full. *Aetna*, 124 S. Ct. at 2494-95.

33. *Aetna*, 124 S. Ct. at 2494. (citing Franchise Tax Bd. Of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 9-10 (1983) and Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)).

34. *Id.* (citing Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908)).

35. *Id.* at 2495 (citing Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 8 (2003)).

ERISA is a federal statute that "wholly displaces" Davila and Calad's state causes of action.[36]

In Subpart B of Part II, the majority outlined ERISA's purpose, which is to make certain that federal, rather than state, government is solely responsible for regulating employee benefit plans.[37] Specifically, the Court established that the comprehensive statute includes "an integrated system of procedures for enforcement."[38] Based on ERISA's stated purpose and objectives, the majority concluded that, because Congress intended the remedies provided under ERISA to be exclusive, state law causes of action that "duplicate, supplement, or supplant" the remedies included in ERISA conflict with Congress' intent and thus are preempted.[39] In order to illustrate ERISA's strong preemptive force, the Court cited *Metropolitan Life Insurance Co. v. Taylor*, which compared the language of ERISA with the language of the Labor Management Relations Act of 1947 (LMRA), and found ERISA's preemptive force parallel with that of the LMRA.[40] Therefore, the Court held that ERISA converts state causes of action that duplicate, supplant, or supplement ERISA causes of action into federal ones for purposes of removal, just as the LMRA does.[41]

In Part III of the majority opinion, Justice Thomas examined the language of ERISA § 502(a)(1)(B)[42] and explained that this straightforward provision allows participants or beneficiaries who believe they are entitled to certain benefits under their plan to sue under ERISA in order to receive those benefits.[43] Hence, the Court opined that ERISA would completely preempt Davila and Calad's state law negligence causes of action if they could have brought

---

36. *Id.*

37. *Id.* (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)).

38. *Aetna*, 124 S. Ct. at 2495 (quoting Massachusetts Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985)). Justice Thomas explained: "[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* (quoting *Pilot Life*, 481 U.S. at 54).

39. *Id.* (citing *Pilot Life*, 481 U.S. at 54-56 and Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143-45 (1990)).

40. *Id.* at 2495- 96 (citing Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987)).

41. *Id.* (citing Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968)).

42. § 502(a)(1)(B) states: "A civil action may be brought— (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

43. *Aetna*, 124 S. Ct. at 2496.

their suits under ERISA § 502 (a)(1)(B) and if neither Aetna nor CIGNA had any duty to the plaintiffs independent of ERISA. [44]

Justice Thomas next turned to the precise issue of whether Davila and Calad's causes of action fell within the scope of ERISA § 502(a)(1)(B), and examined the complaints, the THCLA and the various plan documents to decide the issue.[45] The Court pointed out that Davila and Calad complained only of their respective benefit plans' refusal to cover particular treatments recommended by their treating physicians.[46] In addition, the sole relationship between Davila and Calad and their respective benefit plans was Aetna and CIGNA's administration of each respondent's ERISA-regulated employee benefit program.[47] Thus, under ERISA, the majority revealed Davila and Calad both could have paid for their respective recommended treatments and sued Aetna and CIGNA for reimbursement.[48]

In response to the alternative to sue for reimbursement, Davila and Calad contended that Aetna and CIGNA each had an independent legal duty under the THCLA to exercise ordinary care; thus, civil action to enforce this duty does not fall within the scope of ERISA § 502(a)(1)(B).[49] Justice Thomas responded to this argument by examining the duty of ordinary care imposed under THCLA and concluded that if an HMO correctly determines a particular treatment is not covered, the proximate cause of the participant or beneficiary's injuries is the plan's failure to cover the particular treatment rather than the denial of coverage.[50] The Court recognized that, under the THCLA, a managed care entity has no obligation to provide a treatment that the plan does not cover.[51] Therefore, Justice Thomas concluded, neither Aetna nor CIGNA had an independent duty of ordinary care because their liability derived only from the obligations instituted by the plans they administered.[52] Because the sole purpose of Davila and Calad's causes of action was to correct the denial of benefits promised them under their respective ERISA-regulated HMOs and not to

---

44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 2496-97.
48. *Aetna*, 124 S. Ct. at 2497 (citing Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266, 274 (3rd Cir. 2001)).
49. *Id.*
50. *Id.* at 2497-98.
51. *Id.* at 2498 (citing TEXAS CIV. PRAC. & REM. § 88.002(d)).
52. *Id.*

seek a remedy for Aetna and CIGNA's violation of an independent legal duty, the Court decided the causes of action fell within the scope of, and were completely preempted by, ERISA § 502(a)(1)(B). Therefore, the causes of action were removable to federal district court.[53]

In Subpart B of Part III, the majority examined and rebutted the reasons for what it determined to be the court of appeals' erroneous conclusions.[54] In response to the court of appeals' reliance on the distinction that Davila and Calad asserted "tort claims for tort damages," rather than "contract claims for contract damages," Justice Thomas stressed that ascribing such labels to claims in order to distinguish whether they are preempted would result in parties dodging ERISA's preemptive scope by merely identifying their claims as actions for tortious breach of contract.[55] In addition, the Court asserted that state causes of action providing for remedies outside those authorized by ERISA are not beyond the scope of ERISA's civil enforcement mechanism.[56]

The Court then directly refuted the lower court's conclusion that the wording of Davila and Calad's benefit plans was immaterial and declared that the wording is, as a matter of law, material.[57] Justice Thomas indicated, contrary to the lower court's belief, that the Court did not imply in *Rush Prudential* that ERISA's preemptive force is limited to state causes of action that exactly duplicate an ERISA § 502(a) cause of action.[58] Instead, the Court asserted that a prerequisite for state causes of action to be duplicative before ERISA can preempt them is both inconsistent with precedent and with Congress' intention that the ERISA civil enforcement mechanism be exclusive.[59]

Davila and Calad presented an argument in the Supreme Court that they did not present in the lower courts: Under ERISA § 514(b)(2)(A), ERISA did not preempt their causes of action be-

---

53. *Aetna*, 124 S. Ct. at 2498.

54. *Id.*

55. *Id.* at 2498-99 (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985)).

56. *Id.* at 2499. Justice Thomas cited *Pilot Life*, *Metropolitan Life*, and *Ingersoll-Rand* to illustrate the notion that ERISA may preempt state causes of action labeled "tort or tort-like," in which the parties sought remedies outside those ERISA authorizes. *Id.* (citing *Pilot Life*, 481 U.S. at 43; *Metropolitan Life*, 481 U.S at 61-62; *Ingersoll-Rand*, 498 U.S. at 136).

57. *Aetna*, 124 S. Ct. at 2499.

58. *Id.* at 2499. *See Rush Prudential*, 536 U.S. at 379.

59. *Aetna*, 124 S. Ct. at 2499. (citing *Ingersoll-Rand*, 498 U.S. at 136 and *Metropolitan Life*, 481 U.S. at 61).

cause THCLA regulates insurance.[60] In striking this argument, the Court pointed to the "overpowering federal policy" in ERISA § 502(a) and Congress' intent that ERISA create an exclusive federal remedy, thus preempting state law claims.[61] Justice Thomas maintained that Congress, when drafting ERISA, consciously chose to include particular remedies and exclude others.[62] The majority therefore decided that to allow participants and beneficiaries to receive state law remedies that Congress chose not to include in ERISA would undermine the federal scheme Congress had in mind.[63]

In the final portion of the opinion, the majority attacked the court of appeals' reliance on *Pegram v. Herdrich* in holding that ERISA did not preempt Davila and Calad's causes of action because the claims do not "relate to an employee-benefit plan."[64] *Pegram* held that HMOs making mixed eligibility and treatment decisions cannot be treated as fiduciaries.[65] Under ERISA, eligibility determinations are fiduciary in nature.[66] The Court stated that HMOs exercising discretionary authority or responsibility in their administration of employee benefit programs when making eligibility decisions must necessarily be fiduciaries.[67] To bolster this conclusion, Justice Thomas cited ERISA § 503, requiring participants and beneficiaries who were denied benefits to have a "full and fair review by the appropriate named fiduciary of the decision denying the claim."[68] Thus, the Court decided that refusal to classify Aetna and CIGNA, who both have discretionary authority over benefits determinations, as fiduciaries would clash with ERISA's regulatory scheme.[69]

---

60. *Id.* at 2500. *See* 29 U.S.C. § 1144(b)(2)(A), which provides, "nothing in this chapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

61. *Aetna*, 124 S. Ct. at 2500 (citing *Rush Prudential*, 536 U.S. at 375).

62. *Id.* (citing *Pilot Life*, 481 U.S. at 54).

63. *Id.* Justice Thomas explained further, "[u]nder ordinary principles of conflict preemption, then, even a state law that can arguably be characterized as 'regulating insurance' will be preempted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." *Id.*

64. *Id.*

65. *Aetna*, 124 S. Ct. at 2501 (citing *Pegram*, 530 U.S. at 215-16).

66. *Id.* (citing Firestone Tire & Rubber Co. v. Brusch, 489 U.S. 101, 111-13 (1989)). ERISA defines a fiduciary as one who has discretionary authority or responsibility in administering employee benefit plans. 29 U.S.C. § 1002(21)(A)(iii).

67. *Aetna*, 124 S. Ct. at 2502.

68. *Id. See* 29 U.S.C. § 1133(2).

69. *Aetna*, 124 S. Ct. at 2502.

After classifying Aetna and CIGNA as fiduciaries, Justice Thomas recognized that *Pegram's* holding was inapplicable to Davila and Calad's causes of action because that holding only applies where negligence also stems from medical maltreatment by an HMO that is either a treating physician or the physician's employer.[70] The majority concluded that, because neither Aetna nor CIGNA employed Davila and Calad's treating physicians, nor were Aetna and CIGNA treating physicians themselves, their decisions not to cover Vioxx and an extended hospital stay were pure eligibility decisions, rendering *Pegram* inapplicable.[71]

Justice Thomas concluded the majority opinion by holding that "respondents' causes of action, brought only to remedy the denial of benefits under ERISA-regulated benefit plans, fall within the scope of, and are completely preempted by, ERISA § 502(a)(1)(B), and thus removable to federal district court."[72]

Justice Ginsburg, with whom Justice Breyer joined, concurred with the majority's opinion because its conclusion was consistent with precedent, but wrote separately to advocate for another look at "what is an unjust and increasingly tangled ERISA regime."[73] The concurring opinion noted that ERISA preempts almost every available state law remedy but does not offer many federal substitutes for those remedies.[74] As a result, Justice Ginsburg asserted, "make-whole" relief is unavailable to persons whose claims are preempted by ERISA.[75] The concurring opinion asserted that these remedial problems demand reconsideration of the limited consequential damages ERISA § 502(a)(3) provides.[76]

In the search for an expansion of the limited remedies available under ERISA, Justice Ginsburg noted the Government's suggestion that ERISA "may allow at least some form of 'make-whole' relief against a breaching fiduciary in light of the general avail-

---

70. *Id.* (citing Cicio v. Does, 321 F.3d 83, 109 (2nd Cir. 2003)).

71. *Id.*

72. *Id.* The Court reversed the court of appeals' judgment and remanded Davila and Calad's cases for further proceedings consistent with the Court's opinion. *Id.*

73. *Id.* at 2503 (Ginsburg, J., concurring) (citing DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453 (3rd Cir. 2003) (Becker, J., concurring)).

74. *Aetna,* 124 S. Ct. at 2503 (Ginsburg, J., concurring) (citing *DiFelice*, 346 F.3d at 456).

75. *Id.* (Ginsburg, J., concurring).

76. *Id.* (Ginsburg, J., concurring). Justice Ginsburg referred to *Mertens v. Hewitt Associates*, where the Court held that "equitable relief" under ERISA § 503(a)(3) only allows for equitable relief, such as an injunction, and not for compensatory damages. *Id.* (citing Mertens v. Hewitt Associates, 508 U.S. 248 (1993)).

ability of such relief in equity."[77] Although Davila and Calad refused to amend their complaints to bring causes of action under ERISA (and thus would not benefit from the Government's suggestion), Justice Ginsburg asserted that the Government's suggestion might prove effective for others in similar situations.[78] The concurring opinion concluded, "Congress . . . intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief."[79]

The "ultimate touchstone" in answering the question of whether a federal law preempts a state law is the intent of Congress.[80] An examination of the purpose, structure and express language of the federal law comprises the determination of congressional intent.[81] The Conference Committee on ERISA demonstrated that Congress intended for ERISA's "preemptive scope [to be] as broad as its language."[82] Senator Williams illustrated the breadth of ERISA preemption at the time of ERISA's enactment in 1974:

> It should be stressed that . . . the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.[83]

In order to facilitate the goal that regulation of employee benefit plans be an exclusive federal concern[84] and to avoid inconsistency between state and federal laws, Congress included various safeguards in ERISA, such as § 514(a), which provides for express,

---

77. *Aetna*, 124 S. Ct. at 2504 (citing Brief for United States as *Amicus Curiae* 27-28, n. 13 (Nos. 02-1845, 03-83)). ERISA § 502(a)(3) does not allow awards of money damages against a non-fiduciary. 29 U.S.C. § 1132(a)(3).

78. *Aetna*, 124 S. Ct. at 2504 (Ginsburg, J., concurring).

79. *Id.* (Ginsburg, J., concurring) (quoting John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trial of Error in Russell, Mertens, and Great-West*. 103 COLUM. L. REV. 1317, 1319 (2003)).

80. *Allis-Chalmers*, 471 U.S. at 208.

81. FMC Corp. v. Holliday, 498 U.S. 52, 56 (1990).

82. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 98 (1983) (citing H. R. Conf. Rep. No. 93-1280, 383 (1974)). Originally, the bill that was to become ERISA contained a limited preemption clause, which applied to state laws that related to subjects expressly included in ERISA. *Id.* However, the Conference Committee opted for broader preemption. *Id.*

83. 120 Cong. Rec. 29197, 29933 (1974).

84. *See Alessi*, 451 U.S. at 523.

expansive preemption, and § 502(a), ERISA's civil enforcement scheme, which is essential in carrying out ERISA's objectives.[85] In 1987, the Supreme Court decided *Metropolitan Life Insurance Co. v. Taylor*,[86] where it examined § 502 and Congress' intent for pre-empted claims that fall within the scope of the civil enforcement mechanism to arise under federal law.[87]

In *Metropolitan Life*, Arthur Taylor, an employee of General Motors, received benefits from his employee benefit plan after a psychiatrist deemed him emotionally unable to work.[88] Although the psychiatrist determined Taylor to be fit to work six weeks later, Taylor did not return to his employment; rather, he filed a supplemental claim for benefits alleging that work-related back injuries he sustained in 1961 prevented him from continuing to work.[89] Six months after a General Motors physician deemed Taylor fit to work, Taylor filed suit against General Motors and Metropolitan Life Insurance Co. for compensatory damages for money contractually owed to him and for mental anguish due to the breach of contract.[90]

In holding that Metropolitan Life and General Motors' removal of Taylor's claims to federal court was proper, the Court relied on the exception to the well-pleaded complaint rule, which allowed Congress to thoroughly preempt a distinct area of law such that any civil complaint raising claims within that area must be characterized as federal in nature.[91] In the majority opinion for the unanimous Court, Justice O'Connor recognized that since the late 1960s, the Court distinguished claims under the Labor Management Relations Act of 1947 (LMRA)[92] as falling within the exception to the well-pleaded complaint rule.[93]

The Court noted that while ERISA preemption is not sufficient to convert a state claim into one arising under federal law, *Franchise Tax Board* suggested that if the claim is within the scope of § 502(a), the *Avco* principle, which provides for conversion of state

85. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990). *See also* 29 U.S.C. §§ 1144(a), 1132(a).

86. 481 U.S. 58 (1987).

87. *Metropolitan Life*, 481 U.S. at 67.

88. *Id.* at 60-61.

89. *Id.* at 61.

90. *Id.*

91. *Id.* at 63-64.

92. 29 U.S.C. §§ 141-197 (1994).

93. *Metropolitan Life*, 481 U.S. at 64 (citing Avco Corp. v. Machinists, 390 U.S. 357 (1968)). The *Avco* principle provides that any preempted suit entirely displaced by § 301 of the LMRA is "purely a creature of federal law." *Franchise Tax Board*, 463 U.S. at 24-25.

claims to federal claims under § 301 of the LMRA, may apply to ERISA.[94] Justice O'Connor identified the similar language of § 502(f) (ERISA's jurisdictional subsection) and § 301 of the LMRA as the basis for holding that preempted claims under ERISA that also fall within the scope of ERISA's civil enforcement mechanism arise under federal law.[95] To further bolster this holding, the Court cited the Conference Report on ERISA: "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor Management Relations Act of 1947."[96] Because Congress intended the jurisdictional provision of ERISA's civil enforcement mechanism to function in the same way as § 301 of the LMRA, any claim that is both preempted by ERISA and within the scope of §502(a) will arise under federal law and is removable to federal court.[97]

One of the first cases in which the Supreme Court examined ERISA's provision for express preemption under § 514 was *Shaw v. Delta Air Lines, Inc.*,[98] in which the Court determined the precise meaning of the phrase "relate to" as it is used in that section.[99] In *Shaw*, the Court examined the New York Human Rights Law, which prohibited discrimination in employee benefit plans on the basis of pregnancy, and the New York Disability Benefits Law, which required employers to pay sick leave benefits to employees who could not work due to pregnancy.[100] Looking to the plain language of the provision, the Court established that "a law 'relates

94. *Metropolitan Life*, 481 U.S. at 63.

95. § 502(f) provides, "[t]he district courts of the United States shall have jurisdiction, without respect to the amount in controversy or citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action." 29 U.S.C. § 1132(f). *Cf.* § 301 of the LMRA: "Suits ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

96. *Metropolitan Life*, 481 U.S. at 65-66 (quoting H.R. Conf. Rep. No. 93-1880, 327 (1974)).

97. *Id.*

98. 463 U.S. 85 (1983).

99. *Shaw*, 463 U.S. at 96. *See also* 29 U.S.C. § 1144 (a), which provides that ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.

100. *Shaw*, 463 U.S. at 96. Delta Air Lines, Inc. and Metropolitan Life Insurance Company, whose employee benefit plans did not provide benefits to employees disabled by pregnancy as required by the New York Human Rights Law and the Disability Benefits law, sued New York state agencies and officials alleging ERISA preemption of those state laws. *Id.*

to' an employee benefit plan . . . if it has a connection with or reference to such a plan."[101]

After examining the legislative history of ERISA,[102] the Court in *Shaw* concluded that Congress intended that the phrase "relate to" be construed broadly, stating that Congress' inclusion of provisions such as § 514(b) (exempting generally applicable criminal statutes from ERISA preemption) would have been meaningless if a more narrow view of the phrase were adopted.[103] Based on this broad interpretation of the phrase, the Court concluded that both the Human Rights Law and the Disability Benefits law "related to" the employee benefit plans that Delta Airlines and Metropolitan Life provided,[104] making the phrase an integral consideration in determining whether ERISA preempts state law.[105]

In *Pilot Life Insurance Co. v. Dedeaux,*[106] the Court considered the issue of ERISA preemption over state law claims based in tort and contract, addressing ERISA's preemption provisions under § 514, the exceptions to those provisions, and the legislative intent of ERISA's civil enforcement provisions under § 502.[107]

In her opinion, written for a unanimous Court, Justice O'Connor summarized § 514(a), ERISA's preemption clause, § 514(b)(2)(A), the saving clause, and § 514(b)(2)(B), the deemer clause: "If a state law 'relate[s] to . . . employee benefit plan[s],' it is pre-empted. The saving clause excepts from the pre-emption clause laws that 'regulate insurance.' The deemer clause makes clear that a state law that 'purport[s] to regulate insurance cannot deem an employee benefit plan to be an 'insurance company.'"[108] In examining

---

101. *Id.*

102. *Id.* at 98-99 (citing H.R. Conf. Rep. No. 93-1280, 383; 120 Cong. Rec., 29197, 29933).

103. *Shaw*, 463 U.S. at 98.

104. *Id.* at 100. The Court held that ERISA preempted the Human Rights Law "only insofar as it prohibit[ed] practices that are lawful under federal law." *Id.* at 108. The Court then held that ERISA did not preempt the Disability Benefits Law because it is exempt under § 4(b)(3) as a disability insurance law. *Id.*

105. *See Ingersoll Rand*, 498 U.S. at 138 ("The key to § 514(a) is found in the words 'relate to.'").

106. 481 U.S. 41 (1987).

107. *Pilot Life*, 481 U.S. at 41. Everate W. Dedeaux suffered a work-related back injury while working for Entex, Inc., which provided employee benefits through Pilot Life Insurance Co. (Pilot Life). *Id.* at 43. Pilot Life terminated Dedeaux's permanent disability benefits after only two years, prompting Dedeaux to file a complaint in federal district court for tortious breach of contract, breach of fiduciary duties, and fraud in the inducement, seeking damages for failure to provide benefits under the policy. *Id.* The district court held that ERISA preempted Dedeaux's claims and granted summary judgment for Pilot Life; the Fifth Circuit Court of Appeals reversed and the Supreme Court granted certiorari. *Id.* at 44.

108. *Id.* at 45. *See also* 29 U.S.C. §§ 1144(a), 1144(b)(2)(A), 1144(b)(2)(B).

Dedeaux's common law claims, the Court recognized that his causes of actions "related to" an employee benefit plan and fell within the broad preemptive scope of § 514(a); hence, ERISA would preempt his causes of action unless they fell within an exception to § 514(a).[109]

Dedeaux argued that his claim for tortious breach of contract and the Mississippi law of bad faith were exempt from ERISA preemption because the law was one regulating insurance under § 514(b)(2)(A).[110] In striking this claim, the Court stated that the determination of whether a state law regulates insurance requires taking a "common sense view" of the language of the clause and applying the three criteria used under the McCarran-Ferguson Act[111] to determine whether the law is in the "business of insurance."[112] Applying the "common sense view" of the language of the saving clause, Justice O'Connor opined that the term "regulates" suggests the law must have a specific relation to the insurance industry; such relation was lacking in the Mississippi bad faith law.[113] Furthermore, the Court concluded the Mississippi law did not gain support from the criteria set forth in the McCarran-Ferguson Act.[114] Specifically, the Court determined that the bad faith law did not spread policyholder risk because it only provided an opportunity for policyholders to obtain punitive damages in the event of a breach;[115] and the law was not integral to the insurer-insured relationship because it was developed from "general principles of tort and contract law."[116]

Justice O'Connor further recognized that the Court must examine the legislative intent of the civil enforcement provisions pro-

109. *Pilot Life*, 481 U.S. at 47-48 (quoting *Shaw*, 463 U.S. at 96 and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) for the proposition that a state law relates to a benefit plan "if it has a connection with or reference to such a plan").

110. *Id.* at 48.

111. 15 U.S.C. §§ 1011-1015 (2004).

112. *Pilot Life*, 581 U.S. at 48. The Court outlined the three criteria under the McCarran-Ferguson Act: "First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Id.* at 49-50 (quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)).

113. *Id.* at 50. The Court further recognized that the Mississippi law has its roots in general principles of tort and contract law; thus, any breach of contract may result in punitive damages under the law. *Id.*

114. *Id.* at 51.

115. *Id.* at 50.

116. *Id.* at 51. The Court noted that, at best, Dedeaux's claims fell under only one of the factors under the McCarran-Ferguson Act. *Id.*

vided in § 502(a) when interpreting the saving clause because Dedeaux sought remedies for Pilot Life's improper processing of his claim for benefits.[117] Recognizing that Congress intended § 502(a) to be exclusive, the Court noted that the civil enforcement scheme in that section is an "essential tool" for achieving ERISA's objectives.[118] The Court referred to *Massachusetts Mutual Life Insurance Co. v. Russell*,[119] in which the Court established "the presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."[120] Thus, Justice O'Connor stated, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."[121] As such, the Mississippi bad faith law was not "saved" under § 514(b)(2)(A).[122]

In 1990, the Court decided *Ingersoll-Rand Co. v. McClendon*,[123] in which McClendon sued his employer, Ingersoll-Rand Company, based on the loss of pension benefits he would have received had the company not terminated him due to a reduction in workforce.[124] The Supreme Court addressed the issue of whether ERISA preempted McClendon's common law claim that Ingersoll-Rand Company unlawfully terminated his employment in order to prevent him from receiving his pension benefits.[125]

In holding that McClendon's claim "related to" an ERISA benefit plan, Justice O'Connor noted the Texas cause of action for unlawful termination both specifically referred to and was premised on

---

117. *Pilot Life*, 481 U.S. at 52.

118. *Id.*

119. A beneficiary of Metropolitan Mutual Life Insurance Company brought an action seeking punitive damages on the basis of a breach of fiduciary duty under ERISA § 409(a), 29 U.S.C. § 1109(a). *Massachusetts Mutual Life*, 473 U.S. at 136-38. The Court held that § 409(a) neither expressly nor impliedly provided for such damages to the beneficiary. *Id.* at 148.

120. *Pilot Life*, 481 U.S. at 53 (quoting *Russell*, 473 U.S. at 147, quoting Northwest Airlines, Inc. v. Transport Workers, 451 U.S 77, 97 (1981)).

121. *Id.* at 54.

122. *Id.*

123. 498 U.S. 133 (1990).

124. *Ingersoll-Rand*, 498 U.S. at 135. McClendon's complaint sounded in tort and contract and asked for compensatory and punitive damages; none of his claims alleged ERISA causes of action. *Id.* at 136.

125. *Id.* at 135.

the existence of a pension plan.[126] In response to McClendon's argument that the language of § 514(c)(2)[127] limits preemption under § 514(a) to state laws affecting plan terms, conditions or administration, the Court explained that § 514(c)(2) expanded the definition of "State" "for preemption purposes in order to 'include' state agencies and instrumentalities whose actions might not otherwise be considered state law."[128] Justice O'Connor indicated that Congress did not intend to restrict ERISA preemption to state laws that affect plan terms and conditions; if it did, it would not have placed such a restriction in a separate definition section while using the phrase "relate to" in the preemption provision.[129]

The Court further articulated the notion of conflict preemption by reasoning that even if McClendon's Texas cause of action was not expressly preempted under § 514(a), it would be preempted because it was in direct conflict with an ERISA cause of action under § 510.[130] Because the Texas cause of action was an alternative and conflicting remedy to that provided in ERISA § 510, Congress' intent was frustrated; thus, ERISA preempted the cause of action even absent express preemption under § 514(a).[131]

In *Pegram v. Herdrich*,[132] the Court addressed the issue of whether treatment decisions made by a health maintenance organization, acting through its physician employees, are fiduciary acts under ERISA, thus allowing for a cause of action based on breach of fiduciary duty.[133] Herdrich brought medical malpractice

---

126. *Id.* at 140. The Court noted that, in order for McClendon to prevail under the Texas law, he must show that a plan exists and that the employer intended to defeat McClendon's receipt of pension benefits; thus, the Court must direct its inquiry to the plan and whether the cause of action "relates to" an ERISA plan. *Id.*

127. *See* 29 U.S.C. § 1144(c)(2), stating, "The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." The ERISA definition of "State" as provided in § 3(10) is "any State of the United States, District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Capital Zone." 29 U.S.C. § 1002(10).

128. *Ingersoll-Rand*, 498 U.S. at 141.

129. *Id.*

130. *Id.* at 142. "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140.

131. *Ingersoll-Rand*, 498 U.S. at 142.

132. 530 U.S. 211 (2000).

133. *Pegram*, 530 U.S. at 214. Dr. Lori Pegram, a physician under Carle Clinic Association, P.C., Health Alliance Medical Plans, Inc. (Carle), decided that Cynthia Herdrich needed to wait eight days after the discovery of an inflamed mass in her abdomen for an

suits against the Carle Clinic and her physician, Dr. Pegram, in state court, also alleging two counts of state law fraud.[134] After removal to federal district court and a grant of summary judgment for defendants on one of Herdrich's fraud claims, Herdrich amended her remaining fraud claim to allege that the provision in her HMO rewarding physicians for limiting medical care constituted an anticipatory breach of an ERISA fiduciary duty under 29 U.S.C. § 1109(a).[135]

The Seventh Circuit Court of Appeals' holding, from which Carle appealed, stated that "incentives can rise to the level of a breach where . . . the fiduciary trust between plan participants and plan fiduciaries no longer exists."[136] Justice Souter, writing for a unanimous Court, recognized that, under ERISA, a fiduciary is someone "acting in the capacity of manager, administrator, or financial advisor to a plan."[137] The Court noted that although Carle was not an ERISA fiduciary by virtue of its administration or exercise of discretionary authority over its own HMO business, it might be a fiduciary if it administers the employee benefit plan subject to ERISA.[138]

Acknowledging that fiduciary responsibilities under ERISA are similar to fiduciaries in the common law of trusts, the Court stated that beyond the threshold of the fiduciary duty of loyalty to the interests of beneficiaries, the analogy between ERISA fiduciaries and trust fiduciaries is problematic.[139] Thus, the threshold question became whether the plan employee who provides services was acting as a fiduciary at the time he or she took the action of which the beneficiary or participant complained.[140]

---

ultrasound, to be performed at a Carle facility fifty miles away. *Id.* at 215. Herdrich's appendix ruptured before the eight days expired, causing peritonitis. *Id.*

134. *Id.* at 215-16.

135. *Id.* at 216. § 1109(a) provides:

> [A]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

136. *Pegram*, 530 U.S. at 217 (quoting Herdrich v. Pegram, 154 F.3d 362, 367 (7th Cir. 1998)).

137. *Id.* at 222. *See also* 29 U.S.C. §§ 1002(A)(i)-(iii).

138. *Pegram*, 530 U.S. at 223.

139. *Id.* at 225. ERISA fiduciaries not only act in the interests of participants in and beneficiaries to the plan, they also may act as employers or plans sponsors; thus, they tend to have adverse financial interests. *Id.*

140. *Id.* at 226.

Justice Souter then discussed the types of treatment decisions plan fiduciaries make: "Pure eligibility decisions" depend on whether the plan covers a particular medical procedure or treatment; "treatment decisions" involve a choice concerning how to diagnose and treat a patient's condition; and "mixed eligibility and treatment decisions" involve both whether the plan covers the particular treatment and how to diagnose and treat the condition.[141] Dr. Pegram's decision that Herdrich wait eight days to receive an ultrasound at a Carle facility fifty miles away was an "inextricably mixed" eligibility and treatment decision because Dr. Pegram made a diagnosis and treatment judgment, which repeatedly occurs in medical administrative decisions; hence, mixed eligibility and treatment decisions are not fiduciary in nature.[142] Therefore, Carle was not a fiduciary to the extent it made mixed eligibility and treatment decisions acting through its physician employee, Dr. Pegram.[143] Herdrich's claim did not state an ERISA cause of action under 29 U.S.C. § 1109.[144]

ERISA §§ 502(a)(1)(B) and 502(a)(3)[145] address participants' rights to recover for wrongs committed against them.[146] In *Mertens v. Hewitt Associates*,[147] former employees who participated in the ERISA-regulated Kaiser Steel Retirement Plan brought an action for money damages for breach of fiduciary duty, alleging that Hewitt Associates did not adjust the plan's actuarial assumptions to reflect additional costs imposed by the participants' early retirements; thus, the participants received far less benefits than they would had the plan been adequately funded.[148] The Supreme Court faced the issue of whether, under ERISA § 502, a participant can seek money damages against nonfiduciaries who partici-

141. *Id.* at 228-29. Mixed eligibility decisions involve the question "whether one treatment option is so superior to another under the circumstances, and needed so promptly, that a decision to proceed with it would meet the medical necessity requirement that conditions the HMO's obligation to provide or pay for that particular procedure at that time in that case." *Id.* at 229.

142. *Id.* at 229.

143. *Pegram*, 530 U.S. at 231

144. *Id.* at 237.

145. 29 U.S.C. § 1132(a)(3) provides:

> A civil action may be brought— 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 terms of the plan.

146. 29 U.S.C. § 1132(a)(1)(B).

147. 508 U.S. 248 (1993).

148. *Mertens*, 508 U.S. at 250.

pate in a fiduciary's breach of duty.[149] Even though the remedies available in § 502 apply only to fiduciaries, the Court decided to hear the case to determine whether the participants were entitled to monetary damages under ERISA § 502(a).[150]

Acknowledging that ERISA has its roots in the common law of trusts, Justice Scalia concluded that,

> [s]ince *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common law court of equity could provide in such a case' would limit the relief *not at all*.[151]

Because elsewhere in ERISA, Congress drew distinctions between "equitable" and "remedial" relief, and between equitable and "legal" relief,[152] interpreting the phrase "equitable relief" in § 502(a)(3) to mean "any relief" would render Congress' inclusion of the word "equitable" in the statute unnecessary.[153] Thus, the Court concluded that "equitable relief," as used in § 502, included not monetary damages, but traditional types of equitable relief, such as injunctions, mandamus and restitution.[154] As a result, extracontractual damages not expressly provided for in ERISA § 502 are unavailable to participants or beneficiaries who seek to recover for wrongs committed against them by their benefit plans.[155]

More recently, in *Great-West Life & Annuity Insurance Co. v. Knudson*,[156] Justice Scalia distinguished between restitution allowed at law and restitution allowed in equity, and concluded that, because restitution allowed at law provides monetary relief, such restitution is not "equitable" as that term is used in ERISA.[157] The Court quoted *Wal-Mart Stores, Inc. Associates' Health & Wel-*

149. *Id.* at 251.
150. *Id.* at 255.
151. *Id.* at 257.
152. *See* ERISA § 409(a); 29 U.S.C. § 1109(a).
153. *Mertens*, 508 U.S. at 258.
154. *Id.* at 256-57.
155. *Id.*
156. 534 U.S. 204 (2002). Great-West paid Mrs. Knudson's medical expenses for injuries she sustained in a car accident. *Id.* at 207. After the Knudson's received a $650,000 settlement from Hyundai, Great-West sued the Knudsons for specific performance of a reimbursement provision in its plan, which provided that plan beneficiaries who had recovered from third-party tortfeasors must make restitution to the plan for benefits the plan paid to the beneficiary. *Id.* at 207-208. The Court disallowed Great-West's claim for reimbursement. *Id.* at 221.
157. *Great-West*, 534 U.S. at 212-13.

fare Plan v. Wells:[158] "A claim for money due and owing under a contract is 'quintessentially an action at law.'"[159] Hence, the Court stated that because monetary damages are necessarily legal in nature, ERISA § 502 (a)(3) does not permit causes of action imposing personal liability for contractual obligations to pay money.[160]

The governing case law concerning ERISA preemption has consistently provided that state law causes of action that "relate to" an ERISA-regulated employee benefit plan are preempted unless they fall within one of the exceptions to ERISA's preemption provisions.[161] As such, participants and beneficiaries like Davila and Calad, who wish to bring suit against their plans to remedy a denial of benefits, must bring their suits in federal court and state ERISA causes of action. Therefore, the holding in *Aetna* is in harmony with precedent. However, as Justice Ginsburg pointed out in her concurring opinion,[162] ERISA's expansive preemptive force, coupled with the limited remedies it provides, leaves many injured parties without legal recourse.[163]

Congress' original intent in enacting ERISA was to protect employees who, prior to ERISA, were entitled to mere nominal pension benefits or to the assets in the pension plan, whichever was lower.[164] In addition, ERISA encouraged employers to provide benefit plans to their employees; employers were not required to do so prior to ERISA's enactment.[165] However, it appears from the long line of Supreme Court cases, providing for complete preemption of beneficiaries' and participants' claims, that ERISA has done everything *but* protect employees. Instead, ERISA appears to provide an advantage to HMOs and other benefit plans by ensuring them a federal forum and shielding them from liability for any legal remedy.[166] Indeed, the Supreme Court, on three occasions, has held that "equitable relief," as used in ERISA, refers to relief allowed in equity at the time before the courts of law and equity were merged in the 1930s.[167] Thus, only traditional equita-

158. 213 F.3d 398 (7th Cir. 2000).
159. *Great-West*, 534 U.S. at 210 (quoting *Wal-Mart Stores, Inc.*, 213 F.3d at 401).
160. *Id.* at 221.
161. *See Shaw*, 463 U.S. at 96; *Ingersoll-Rand*, 498 U.S. at 140.
162. *Aetna*, 124 S. Ct. at 2503 (Ginsburg, J., concurring).
163. *Id.* (Ginsburg, J., concurring).
164. *DiFelice*, 346 U.S. at 454 (Becker J., concurring).
165. *Id.* (Becker, J., concurring).
166. *Id.* at 453 (Becker J., concurring).
167. *See Russell*, 473 U.S. 146-47; *Mertens*, 508 U.S. at 256-57; *Great West*, 534 U.S. at 221.

ble remedies are available under ERISA; one may not seek legal relief in the nature of compensatory damages.[168] The Court reinforced the advantage to HMOs and benefit plans with its holding in *Aetna* that ERISA completely preempts state law claims seeking damages for harm resulting from a denial of benefits.

Justice Ginsburg pointed out that if Davila and Calad had amended their complaints to bring ERISA causes of action, then they may have been able to sue Aetna and CIGNA as breaching fiduciaries.[169] However, the court of appeals dismissed Davila and Calad's claims with prejudice as a result of their refusal to amend their complaints;[170] hence, they are precluded from ever seeking relief for the injuries they endured as a result of Aetna and CIGNA's eligibility decisions. To the average American citizen, this outcome must surely seem unjust. The lesson to be learned in the wake of the decision in *Aetna* is to recognize that the possibility of "make-whole" relief under ERISA is almost impossible.[171] Because of the limited remedies available under § 502(a)(3), as well as the consistency with which the Court has held for federal preemption of state law claims against ERISA-regulated benefit plans, care must be taken in preparing for litigation concerning ERISA claims. Otherwise, injured persons, in positions similar to that of Davila and Calad, will likely be unable to receive compensation for benefits denied them, even if their complaints state ERISA causes of action.

ERISA is rooted in the common law of trusts,[172] which provides for a make-whole standard of relief.[173] Arguably, ERISA should then also provide for make-whole relief in the form of something other than strict equitable relief. Although, in its decisions concerning ERISA preemption, the Court has aimed to carry out Congress' intent, it appears that the Court has instead taken the analysis a step too far by precluding those injured by their ERISA-regulated plans from obtaining any compensation for their inju-

168. However, it may be possible for one to realize "make-whole" relief against a breaching fiduciary because the Court has disallowed awards of money damages only against *non*-fiduciaries. *Aetna*, 124 S. Ct. at 2504 (Ginsburg, concurring) (quoting Brief for the United States as *Amicus Curiae* 27-28, n. 13 (Nos. 02-1845, 03-83)).

169. *Aetna*, 124 S. Ct. at 2504 (Ginsburg, J., concurring).

170. *Id.* at 2493.

171. *See* Langbein, *supra* note 79, at 1319.

172. *See Mertens*, 508 U.S. at 257.

173. Langbein, *supra* note 79, at 1319. (Analyzing the Court's holdings in *Russell, Mertens* and *Great-West* as being inconsistent with Congress' intent that "ERISA remedy law replicate the core principles of trust remedy law").

ries.[174] Therefore, it is imperative that both Congress and the Supreme Court take action to unravel the "unjust and increasingly tangled ERISA regime"[175] to ensure that claimants realize the justice they deserve.

Lisa M. Schonbeck

174. *See Id.*

175. *Aetna*, 124 S. Ct. at 2503 (quoting *DiFelice*, 346 F.3d at 453 (Becker, J., concurring)).