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COMMENT

NOT-SO-EQUITABLE LIENS: ERISA FIDUCIARIES CROSS-DRESS LEGAL REMEDIES AS EQUITABLE

Brandon S. Osterbind[†]

I. INTRODUCTION

The Supreme Court of the United States has the unfortunate role of finding the law[1] and determining what it is.[2] While this may seem to be a simple and intuitive task, interpreting the Employee Retirement Income Security Act (ERISA)[3] inevitably results in a "descent into a Serbonian bog wherein judges are forced to don logical blinders and split the linguistic atom to decide even the most routine cases."[4]

The average personal injury plaintiff does not appreciate the nature of the litigation[5] that results in the achievement of the plaintiff's ultimate goal:

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1. Law "is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated." 2 THOMAS AQUINAS, SUMMA THEOLOGICA, Question 90, art. 4, at 995 (Fathers of the English Dominican Province trans., Benziger Bros. 2d ed.1948).

2. Marbury v. Madison, 5 U.S. 137, 177 (1803).

3. 29 U.S.C. § 1001 (2006).

4. DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 454 (3d Cir. 2003) (Becker, J., concurring) (footnote omitted). "A Serbonian bog is a mess from which there is no way of extricating oneself. E. Cobham Brewer, *The Dictionary of Phrase and Fable* 1121-22 (First Hypertext ed.). The Serbonian bog itself was between Egypt and Palestine. Strabo called it a lake, and said it was 200 stadia long, and 50 broad; Pliny made it 150 miles in length. Hume said that whole armies have been lost therein, as did Milton: 'A gulf profound as that Serbonian bog, / Betwixt Damiata and Mount Cassius old, / Where armies whole have sunk.' Milton, *Paradise Lost*, ii. 592." *Id.* at 454 n.1.

5. Robert Friedman, *Personal Injury Litigation Guide*, 87 AM. JUR. Trials 275 § 14 (2007). Friedman details the complex process of litigation including complaints, answers, summary judgment practice, motions to dismiss, discovery options, and trial scheduling and planning. Conspicuously absent from this description of the litigation process is the trial itself. The average plaintiff typically fails to comprehend the nature of litigation because the average plaintiff envisions litigation as simply a trial when in fact the majority of litigation consists more of the pre-trial process.

judgment and damages.[6] Further, the average plaintiff does not appreciate the nature of post-judgment litigation, which is the subsequent effort by lien holders to attach a lien to the judgment.[7] This litigation is plagued with liens against a plaintiff's judgment by institutions that have contributed to the plaintiff's medical care, such as medical care providers, insurance companies, Medicaid,[8] and Employee Benefit Plans ("Plans") governed by ERISA.[9]

When a person is injured by a tort, the person may initially seek to have his or her medical expenses paid by Medicaid (if the person is indigent)[10] or a plan (if the person is covered by one).[11] If the injured person later obtains recovery from the tortfeasor, Medicaid or the plan asserts a lien against that recovery, either by operation of law or by contract.[12]

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6. Michael L. Moffit, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 489 (2007) (pointing out the major problem with tort litigation and the reason for the decline in civil trial rates, namely procedural changes in the litigation process that makes litigation cost-prohibitive to the average plaintiff.)

7. It is important to note that this Comment does not use the term "post-judgment litigation" to refer to a plaintiff's seeking to enforce his or her judgment against an insolvent defendant. *But see* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 617 (2006) (using the term in that manner).

8. *See* 42 U.S.C. § 1396k (2007) (requiring state agencies to require beneficiaries to sign right to repayment provisions before extending Medicaid benefits); 42 U.S.C. § 1396p (2007) (limiting the right of the state agency to seek a lien against a Medicaid beneficiary's property).

9. *See* 29 U.S.C. § 1132(a)(3) (2007) (providing ERISA plan fiduciaries the ability to seek equitable remedies from a plan beneficiary, including an equitable lien). Whether a particular employee benefit plan is governed by ERISA is determined by 29 U.S.C. § 1003, but that issue is beyond the scope of this Comment. This Comment will address only those employee benefit plans that are governed by ERISA.

Most of the time, medical care providers are compensated by Medicaid, Medicare, or insurance plans. "In 2004, 34% of personal health care expenditures were paid by the federal government and 11% by state and local government; private health insurance paid 36% and consumers paid 15% out-of-pocket." NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2006, at 13 (citation and emphasis omitted).

10. *See generally* 42 U.S.C. § 1396a(a)(10)(A) (list of Medicaid eligibility requirements).

11. *See generally* 29 U.S.C. § 1002(6)-(8) (definitions of employee, participant, and beneficiary).

12. *See* 29 U.S.C. § 1132(a)(3) (2007) (providing ERISA plan fiduciaries the ability to seek equitable remedies from a plan beneficiary, including an equitable lien); J. Michael Hayes, *Are Medicare, Medicaid, and ERISA Liens? Resolving "Liens" in Personal Injury Settlements*, NEW YORK STATE BAR JOURNAL, Sept. 2007, at 30 (stating that "[t]he majority of the ERISA health insurance plans have, in varying forms, a subrogation/equitable lien provision.")

In *Sereboff v. Mid Atlantic Medical Services*,[13] Marlene and Joel Sereboff were insured by an employer-sponsored benefit plan administered by Mid Atlantic Medical Services, Inc.[14] The plan covered their medical expenses for sickness or injuries.[15] However, the plan provided that if a third party caused sickness or injury to the Sereboffs and they subsequently obtained recovery from that third party, the Sereboffs would reimburse the plan out of the award.[16] The reimbursement provision also mandated that even if the Sereboffs did not fully recover, the plan's reimbursement would not be reduced unless the plan agreed to such reduction in writing.[17] While the Sereboffs were covered by the plan, they were injured in a car accident.[18] As a result of those injuries, the plan paid $74,869.37 in medical expenses on behalf of the Sereboffs.[19] Later, the Sereboffs settled with a third party involved in the accident for $750,000, without specifying whether any portion was allocated to medical expenses.[20] The Court granted Mid Atlantic its lien in the full amount of expenses paid on behalf of the Sereboffs, but did not inquire into what amount of the settlement was designated for medical expenses.[21]

The factual situation in *Sereboff* (involving ERISA liens) is virtually identical to *Arkansas Department of Medical Services v. Ahlborn* (involving Medicaid liens).[22] In both cases, a person was injured by a tortfeasor; the person suffered medical and other damages; the plan or Medicaid paid for medical treatment of the person; the person sued the tortfeasor; and the plan or Medicaid asserted a lien against the judgment. While this is a simplified description of the factual scenario, it is accurate nonetheless.

While both Medicaid and the plan may be entitled to claim a lien arising out of the same situation, both Medicaid and ERISA diverge in determining the extent of the lien.[23] The ability of both entities to actually have a lien is not in dispute; however, the extent of the lien should be the subject of much

13. 547 U.S. 356 (2006).
14. *Id.* at 359.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 360.
19. *Id.*
20. *Id.*
21. *Id.*
22. Compare *supra* notes 13-21 and accompanying text with the facts of *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006). Although the facts are virtually identical, the results are drastically different.
23. *Compare Ahlborn*, 547 U.S. 268, *with Sereboff*, 547 U.S. 356.

scrutiny.[24] For example, if the beneficiary of a plan or Medicaid obtains a judgment for his injuries, is the plan's or Medicaid's lien limited to the amount the beneficiary recovers for medical damages or the entire judgment amount?[25] If Medicaid only contributed to medical expenses, should its lien extend to the full judgment amount including non-medical compensatory damages, or should its lien be limited to only compensatory damages for medical expenses?[26] Likewise, if a plan only contributes to medical expenses, should its lien extend to the full judgment including non-medical expenses, or should its lien be limited to only medical expenses?[27]

While the factual scenario is the same, Medicaid and ERISA differ significantly on this minute point. In *Ahlborn*, the Supreme Court intimated that allowing Medicaid to claim a lien for more than the amount for which the third party is liable for medical expenses is "absurd and fundamentally unjust."[28] In *Sereboff*, the Court did not inquire into the amount for which the third party is liable for medical expenses, but rather, it allowed the plan to enforce an equitable lien for the full amount of benefits paid.[29]

In order to comprehend this drastic deviation from freshly-settled law, this Comment will explore the leading cases developing the federal common law

24. *See Ahlborn*, 547 U.S. 268.

25. *See infra* Part IV.

26. *See infra* Part IV.A.

27. *See infra* Part IV.B.

28. *Ahlborn*, 547 U.S. at 288 n.19. The Court did not specifically say that this result was absurd and fundamentally unjust; rather, the Court compared the outcome in *Ahlborn* with the result in *Flanigan v. Department of Labor & Industries*, 869 P.2d 14 (Wash. 1994). The Supreme Court noted that in *Flanigan*, "the court concluded that the state agency could not satisfy its lien out of damages the injured worker's spouse recovered as compensation for loss of consortium. The court explained that the department could not 'share in damages for which it has provided no compensation' because such a result would be 'absurd and fundamentally unjust.'" *Ahlborn*, 547 U.S. at 288 n.19 (quoting *Flanigan*, 869 P.2d 14, 17). The Supreme Court used *Flanagan* to illustrate why it would not allow Medicaid to claim a lien for the amount in excess of the amount for which the third party is liable for medical expenses. This Comment will strive to define what the Supreme Court means when it says that something is fundamentally unjust. Even though it seems that the Court's definition is strikingly similar to the legal positivist definition, this Comment will argue that justice is an extrinsic standard by which we must judge our laws.

29. *See* Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356 (2006). Actually, it is unclear whether justice was done in this case because the award was not apportioned between the different types of compensatory damages. The plaintiff recovered $750,000, and the lien was for approximately $75,000. It does not seem unreasonable that 10% of the entire award was attributable to medical expenses. But without specifying the limitation on the equitable lien, the Supreme Court made imprecise law that, in turn, allows injustice to reign in the district courts. Regardless, the plan claimed a lien for the full amount that it paid for the beneficiary's medical expenses, and the Court agreed and gave the full compensation.

of ERISA through which the federal judiciary established a right to an equitable lien inuring to the benefit of the plan, and the common law that should inform the courts' determination of the plan's remedy against the beneficiary.[30] While tracing the development of this federal common law, this Comment will analyze the application of common law rules to the statutory limitation of remedies available to an Employee Benefit Plan, that is, equitable relief.[31] The largest limitation to a plan's recovery is this equitable relief requirement. In light of this limitation, this Comment will attempt to differentiate legal relief from equitable relief in order to determine whether the Supreme Court correctly concluded that the remedy in *Sereboff* was equitable.[32] Contrary to the Supreme Court's conclusion, this Comment will conclude that the relief granted in *Sereboff* is legal, rather than equitable; and therefore, the statute prohibits such relief.[33]

Furthermore, this Comment will analogize ERISA lien situations to Medicaid lien situations and argue that the courts have misapplied the principles of equity and ignored the principles established in *Ahlborn*.[34] Specifically, the Supreme Court has ignored the principle of justice in ERISA reimbursement cases and attempted to define justice, an extra-systemic principle, systemically.[35] In sum, this Comment will conclude that if the results in Medicaid reimbursement cases were unjust, then the results in ERISA reimbursement cases are likewise unjust. Therefore, the statutory requirement that relief be equitable requires the court to limit the plan's lien against a plaintiff's judgment to the amount for which the third party is liable for medical expenses.[36]

II. FEDERAL COMMON LAW REGARDING REIMBURSEMENT OF ERISA FIDUCIARIES

Congress enacted ERISA in 1974 in response to a substantial number of employers instituting employee benefit plans.[37] The purpose of ERISA was to increase the equitable character of the plans, and to ensure that when plans were mismanaged, employees would be protected from significant loss.[38]

30. *See infra* Part II.
31. *See infra* Part II.B.
32. *See infra* Part III.
33. *See id.*
34. *See infra* Part IV.
35. *See infra* Part IV.B.
36. *See infra* Part V.
37. Pub. L. No. 93-406 § 2(A) (codified at 29 U.S.C. § 1001(a) (2009)).
38. *See* 29 U.S.C. § 1001(a) (2009) (stating the purpose and congressional findings that prompted Congress to enact the Employee Retirement Income Security Act of 1974, such as

Thirty-five years later, an evaluation of the current status of the law reveals an obvious preference for reimbursing plans for the full extent of benefits paid in the case of third party liability.[39] This preference fails to ensure the equitable character of the plan and disregards the protection of the beneficiaries. Because Congress failed to regulate and guide the courts in the resolution of third party liability issues, the federal courts have applied what they call a "federal common law."[40]

This federal common law has emerged, for the purposes of this Comment, largely around the interpretation of four words: "other appropriate equitable relief."[41] ERISA provides the fiduciaries of an Employee Benefit Plan the ability to sue the beneficiary for equitable relief.[42] Federal courts have struggled to interpret that language, mainly because of the ambiguity of what the term "equitable" includes.[43] However, in *Mertens v. Hewitt Associates*,

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the stability of employment, successful development of industrial relations, lack of employee information and adequate safeguards concerning their operation, inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits where endangered employees are being deprived of anticipated benefits because of the termination of plans without adequate funds, protection of the revenue of the United States, and free flow of commerce; and stating the authority under which Congress has the power to regulate employee benefit plans, U.S. CONST. art. I, § 8, cl. 3). The intent behind enacting ERISA was to ensure that there would be minimum standards to assure the equitable character of each plan.

39. *See* Sereboff v. Mid Atlantic Medical Servs., 547 U.S. 356 (2006); *In re* Carpenter, 245 B.R. 39 (Bankr. E.D. Va. 2000); Dugan v. Nickla, 763 F. Supp. 981 (N.D. Ill. 1991); FMC Corp. v. Holliday, 498 U.S. 52 (1990); Provident Life and Accident Ins. Co. v. Waller, 906 F.2d 985 (4th Cir. 1990). This Comment argues that this result is a legal remedy, and it is fundamentally unjust in light of the considerations emphasized in *Ahlborn*, 547 U.S. at 288.

40. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989), *In Re* Carpenter, 245 B.R. 39, 45 (Bankr. E.D. Va. 2000); Pacificare Inc. v. Martin, 34 F.3d 834, 836 (9th Cir. 1994). This concept of a federal common law is not the same as the concept dealt with in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938); rather, it is a development of federal statutory interpretation incorporating common law concepts, such as an equitable lien.

41. 29 U.S.C. § 1132(a)(3) (2006).

42. *Id.*

43. *See, e.g.*, *Sereboff*, 547 U.S. 356 (holding that the claim was equitable because the funds were in the possession of the beneficiary); Great West Life & Annuity Co. v. Knudson, 534 U.S. 204 (2002) (holding that the claim was legal because the property was not in the possession of the beneficiary); *Carpenter*, 245 B.R. 39 (holding that the claim was equitable because the contract identified particular property with a particular obligation); FMC Medical Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997) (holding that the claim was not equitable because the basis of the claim sounded in contract rather than subrogation or restitution); *Waller*, 906 F.2d 985, 993 (4th Cir. 1990) (holding that the factual situation was the "archetypal unjust enrichment scenario" and allowing the restitution remedy); *Dugan*,

which was the Supreme Court's first attempt to interpret this language, the Court stated that "[t]he authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute."[44] Therefore, even though the federal courts can fashion a federal common law, a court cannot award legal relief because the statute expressly limits a plan's relief to equitable relief.[45]

The Supreme Court interpreted the text of the statute to allow "appropriate equitable relief for the purpose of redress[ing any] violations or . . . enforc[ing] any provisions of ERISA or an ERISA plan."[46] In *Mertens*, the plaintiffs sought relief from a non-fiduciary who participated in a breach of fiduciary duty, which led to losses by the plan as a whole.[47] The Court refused to grant the plaintiff's requested relief because their relief was legal in nature, rather than equitable.[48]

> Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages—monetary relief* for all losses their plan sustained *as a result of* the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief.[49]

The Court defined compensatory damages, for ERISA purposes, as (1) monetary relief, and (2) a result of a breach of a legal duty. The Court analogized the language in Title 29 of the United States Code, section 1132(a)(3) to the language in Title VII of the Civil Rights Act of 1964, where the Court interpreted the phrase "'any other equitable relief as the court deems appropriate' . . . to preclude awards for compensatory or punitive damages."[50] The attitude of the *Mertens* Court was to eliminate the possibility

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763 F. Supp. at 984 (holding that the language of the plan authorizes a lien against the judgment property because the contractual language provides for "*any recovery* . . . from *any* person").

44. Mertens v. Hewitt Associates, 508 U.S. 248, 259 (1993). *Mertens* seems to expressly limit the application of the creative (legislative) minds of federal judges. *Mertens* is the original case dealing with 29 U.S.C.A. § 1132(a)(3). While *Mertens* dealt with a different issue from the topic of this Comment, *Mertens* opened the door for further interpretation of § 1132(a)(3) in *Knudson*.

45. *See infra* Part III for a discussion of 29 U.S.C. § 1132.

46. *Mertens*, 508 U.S. at 253 (alterations in original) (internal quotation marks omitted).

47. *Id.* at 251.

48. *Id.* at 255.

49. *Id.* (emphasis added on "monetary relief" and "as a result of"); *see also* Curtis v. Loether, 415 U.S. 189, 196 (1974); Teamsters v. Terry, 494 U.S. 558, 570-71 (1990); DAN B. DOBBS, 1 LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 3 (2d ed. 1993).

50. *Mertens*, 508 U.S. at 255 (citation and internal quotation marks omitted).

of subterfuge; that is, claiming equitable remedies when, at the core, the petitioner seeks legal remedies. To prevent that subterfuge, the Court required that if both elements of compensatory damages are met, then the relief is, at its base, legal. "[T]he text of ERISA leaves no doubt that Congress intended 'equitable relief' to include only those types of relief that were typically available in equity, such as injunction, mandamus, and restitution."[51] Since the relief sought was legal, it was proscribed by ERISA.

Thus, the question that courts must answer before allowing a fiduciary to seek relief from the beneficiary is whether the relief sought is legal or equitable. This section will explore the key cases dealing with the type of relief sought and the underlying remedy allowed by the courts under the "other appropriate equitable relief" language.

A. *Where an ERISA Beneficiary Recovers from a Third-Party Tortfeasor, the ERISA Fiduciary May Assert an Equitable Lien for the Full Amount of Benefits Paid.*

Federal courts have ruled for and against the concept of equitable liens, developing the current body of federal common law.[52] While the courts struggled for some time to determine the exact device that allows the plan to recover in such a way, the Supreme Court finally settled the issue in favor of allowing equitable liens.[53]

Before the courts created a cause of action for equitable liens, the courts relied upon other equitable recovery methods.[54] The court in *Dugan v. Nickla* squarely addressed the issue of this Comment in a subrogation context.[55] In that case, the issue was "whether the subrogation provision covers amounts received from third parties for pain and suffering, disability and disfigurement, and lost earnings."[56] The plan claimed a lien against the beneficiary's judgment for the amount of "$60,690.10 for medical payments and $8,632.51 for disability payments" because the plan had paid for both of

51. *Id.* at 248.

52. *See, e.g.*, Great-West Life Ins. & Annuity Co. v. Knudson, 534 U.S. 204 (2002); Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006); *In re* Carpenter, 245 B.R. 39 (Bankr. E.D. Va. 2000); Pacificare Inc. v. Martin, 34 F.3d 834, 838 (9th Cir. 1994); Dugan v. Nickla, 763 F. Supp. 981 (N.D. Ill. 1991).

53. *See Sereboff*, 547 U.S. 356.

54. Dugan v. Nickla, 763 F. Supp. 981 (N.D. Ill. 1991) (allowing a claim for subrogation pursuant to the terms of the plan).

55. *Id.*

56. *Id.* at 983.

these injuries.[57] The beneficiary, in that case, recovered from a third party tortfeasor as follows:[58]

Medical Expenses:	$7,000
Pain and Suffering:	$56,000
Disability and Disfigurement:	$55,000
Lost Wages:	$22,750
Total:	$140,750

The court discussed the provisions of the plan and held that the plan did not limit the lien to the amount of medical expenses recovered by the beneficiary; the court granted a broad lien against the beneficiary's entire judgment.[59] The court allowed the plan to recover $60,000 when the beneficiary only recovered $7,000 for medical expenses from the tortfeasor and the plan only paid $8,632.51 for disability.[60] The plan, in essence, took $44,367.49 from the beneficiary's recovery for pain and suffering, disability, and lost wages.[61]

While this conclusion was governed by ERISA, the Supreme Court viewed this conclusion as absurd and fundamentally unjust in Medicaid lien situations.[62] In fact, this conclusion blatantly contradicts the analysis in *Ahlborn*, which held that Medicaid liens are limited to the amount recovered from the tortfeasor for medical expenses.[63] Following the *Ahlborn* analysis, because the plan only contributed to the beneficiaries' medical expenses and disability, the plan is only entitled to the recovery for medical expenses and disability; that is, $7,000 and $8,632.51 for a total of $15,632.51.[64] It appears that the court in *Dugan* allowed the plan to share in damages for which it provided no compensation. The plan only compensated for medical expenses and disability, but it never provided compensation for pain and suffering or lost wages.[65] Thus, the plan paid for medical expenses that it was contractually required to pay. In consideration for that contractual obligation, the beneficiary, or the beneficiary's employer, is obligated to pay premiums, probably on a monthly basis. Even though the plan paid $60,690.10, allowing

57. *Id.* at 982.
58. *Id.*
59. *Id.* at 984.
60. *Id.*
61. This Comment will argue in Parts III-IV that this result is unjust.
62. *Ahlborn*, 547 U.S. 268, 288 n.19 (2006).
63. *Id. passim.*
64. *Dugan*, 763 F. Supp. at 984. Even though the beneficiary recovered $55,000 for disability and disfigurement, the plan only contributed $8,632.51. *Id.*
65. *Id.* at 982.

the plan to recover beyond that to which it is entitled makes the relief legal, not equitable.[66]

On the contrary, in *Pacificare Inc. v. Martin*, the beneficiary's plan included the equivalent of a "rights of third parties" provision, which required that if the beneficiary recovered damages for injuries caused by a third party, then the plan would be entitled to reimbursement.[67] The beneficiary recovered a full award from the third party tortfeasor.[68] The district court for the Central District of California dismissed the case for failure to state an equitable claim and the United States Court of Appeals for the Ninth Circuit affirmed the decision.[69]

The Ninth Circuit stated that the plan's claim was not equitable because it was based on a breach of contract theory, which is a legal claim.[70] The Ninth Circuit applied the traditional analysis distinguishing legal from equitable remedies; that is, a claim for breach of contract is the quintessential legal claim. By suing under the "rights of third parties" provision, the plan is essentially saying that the beneficiary has failed to reimburse the plan under the terms of the contract; therefore, the plan is entitled to damages for breach of contract. The Ninth Circuit, unlike the district court in *Dugan*, recognized that this breach of contract issue means that the remedy sought is legal and not equitable.[71] The plan's right to reimbursement arises directly out of a contractual agreement by both parties. The core claim does not change when the plan phrases the relief in equitable terms. Otherwise, the court elevates form over substance, which lends to stratagem, which in turn lends to injustice, corruption, and subterfuge.

Compare *FMC Medical Plan v. Owens*,[72] where the plan paid approximately $50,000 for medical expenses and Owens settled his claim for $100,000 (the maximum limit of the tortfeasor's policy).[73] The Ninth Circuit held that the remedy sought was legal, not equitable.[74] The court said that restitution in the form of a constructive trust is limited to "ill-gotten" gains and does not apply to any other form of unjust enrichment.[75] Rather than

66. *See infra* Parts III-IV.
67. Pacificare, Inc. v. Martin, 34 F.3d 834, 835 (9th Cir. 1994).
68. *Id.*
69. *Id.* at 838.
70. *Id.*
71. *See id.*
72. FMC Medical Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997).
73. *Id.* at 1259.
74. *Id.* at 1262.
75. *Id.* at 1261 ("ill-gotten" gains refers to gains received based on fraud or some other illegal method).

equating the plan's claim to subrogation or a constructive trust, the court chose to view this claim as one for breach of contract seeking monetary damages.[76] However, the court implied that if the plan provided for subrogation, such a remedy would be allowed under 29 U.S.C. § 1132(a)(3).[77] Owens' plan did not provide for subrogation; rather, it simply required the beneficiary to reimburse FMC for its payments made on his behalf, should Owens recover from a third party.[78]

This "right to reimbursement" provision is essentially the same provision as the "acts of third parties" provision that was present in *Sereboff*.[79] In holding that the relief sought was legal, the Ninth Circuit cited a 1995 decision in which the court held that "equitable relief in the form of the recovery of compensatory damages is not an available remedy under 29 U.S.C. § 1132(a)(3)."[80] The court further indicated that "[w]hen the substance of the relief is monetary, . . . such a remedy is not available under section 1132(a)(3)."[81] This language tracks the *Mertens* test almost precisely: when the underlying claim is legal, and the relief sought is monetary/compensatory, the claim as a whole is legal and therefore proscribed by ERISA.

The Ninth Circuit's analysis narrowly construed 29 U.S.C. § 1132(a)(3)—a view that is dictated by a strict interpretation of the statutory language. Congress specifically provided a remedy for "other appropriate equitable relief."[82] In order to interpret the statutory language, the federal courts must give due deference to every word of the statute and presume that Congress meant every word that it used to effectuate its goals.[83] By including the term

76. *Id.* at 1261. The Ninth Circuit stated that the relief sought was not subrogation because there was no subrogation provision in the plan that entitled the plan to "step in the shoes" of Owens. Furthermore, the claim was not for restitution because the gains received by the beneficiary were paid rightfully under the terms of the plan. Because the funds paid by the plan were not obtained unlawfully, there can be no restitution of ill-gotten gains.

77. *Id.* at 1260.

78. *Id.* at 1260. Specifically, the plan called this a "Right to Reimbursement" provision.

79. *Sereboff*, 547 U.S. 356 (2006). The "Acts of Third Parties" provisions are virtually identical to the "Right to Reimbursement" provisions because both are contingent on acts of third parties and both require repayment in the case of a recovery from that third party. The majority of ERISA plans provide for this situation where the beneficiary is injured by a third party tortfeasor and the plan has paid some funds for the medical expenses resulting from that injury. *See Hayes*, *supra* note 12, at 30.

80. *FMC*, 122 F.3d at 1261 (quoting McLeod v. Oregon Lithoprint, Inc., 46 F.3d 956, 960 (9th Cir. 1995).

81. *Id.* at 1262.

82. 29 U.S.C. 1132(a)(3) (2009).

83. *Mertens*, 508 U.S. 248 (1993). The Court discussed its refusal to infer causes of action and stated that ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply

"equitable" in front of the word "relief," the federal courts must presume that Congress intended to limit the relief available to employee benefit plans governed by ERISA. Even though modern courts have merged the law and equity courts, the limitation precludes federal judges from granting legal relief to a fiduciary of an employee benefit plan. The questions then become: what is legal relief, and what is equitable relief? Federal courts have distinguished the two on several occasions and the Ninth Circuit upheld that distinction in *FMC*.[84]

The Supreme Court granted certiorari in *Great West Life & Annuity Ins. Co. v. Knudson* apparently to distinguish between what relief is permitted under the statute and what relief is not.[85] In *Knudson,* the plan sought restitution for benefits paid to the beneficiary because of damages that the beneficiary recovered from a third party tortfeasor under a contract term similar to the "rights of third parties" provision in *Pacificare*.[86] However, in *Knudson,* the funds from the recovery were disbursed via two checks: one to the attorney for fees and expenses, and another to a "special needs trust" with the plan beneficiary as the beneficiary of the trust.[87] The plan argued that restitution is a form of equitable relief, but the Supreme Court disagreed and asserted that restitution can be both a legal and an equitable remedy.[88] In disagreeing with the plan, the Court articulated a rather mechanical standard:

> "[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case," and *whether it is legal or equitable depends on the "basis for [the*

forgot to incorporate expressly.'."); *See also* Platt v. Union Pac. R. Co., 99 U.S. 48, 58 (1878) (stating that the "admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every world [sic] in a statute.").

84. FMC Medical Plan v. Owens, 122 F.3d 1258, 1259 (9th Cir. 1997); *cf.* Wenzel & Henoch Const. Co. v. Metropolitan Water Dist. of Southern Cal., 18 F. Supp. 616, 620 (S.D. Cal. 1937) (noting that "[t]he distinction between law and equity is maintained rigorously in the federal courts. . . . Behind [this principle] is the fundamental fact that law and equity are dissimilar. The dissimilarity lies in the substantive rights which they administer. Even the reformed code procedure, which has abolished the distinction between actions at law and suits in equity and allows remedies both legal and equitable to be administered in the same forum and in the same action, has not abolished the substantive distinction between law and equity. To call for the intervention of a court of chancery, it is still necessary, under it, to allege special equitable grounds").

85. *Knudson,* 534 U.S. 204 (2002).

86. *Id.* at 207.

87. *Id.* at 207-08, 214.

88. *Id.* at 212.

> *plaintiff's] claim" and the nature of the underlying remedies sought.*
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> . . . .
>
> . . . [F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.[89]

The analysis in *Knudson* was rather simple under this test: because the money was not in the respondent's possession, the Court held that the petitioners sought to impose personal liability on the respondent for money that was past due under a contract, which was traditionally a legal remedy.[90]

The *Knudson* test, though, can be very complicated and may require more than the light intellectual treatment the Supreme Court gave it in *Sereboff.* The test for legal versus equitable remedies set out by *Knudson* includes (1) a negative element and (2) a positive element. The negative element is that the action must not seek to impose personal liability on the defendant. The positive element is that the funds have to be in the defendant's possession. Conceptually, the positive element is a part of the negative element. In other words, if the funds are not in the defendant's possession, then the application of a lien imposes personal liability on the defendant.[91] The converse, however, is not necessarily true because the Supreme Court has enunciated an additional requirement that the plaintiff be, in good conscience, entitled to the funds.[92] The converse would be that if the funds are in the defendant's

89. *Id.* at 213-14 (emphasis added) (quoting Reich v. Continental Casualty Co., 33 F.3d 754, 756 (7th Cir. 1994)). In *Knudson*, the Supreme Court held that the statutory reference to "equitable relief" should be construed narrowly, in particular to the relief typically available in courts of equity. Thus, the Court distinguished between two types of restitution: restitution that would have been available in a court of law, and restitution that would have been available in a court of equity. Only the latter can be awarded under § 1132(a)(3).

90. *Id.* at 214.

91. *Id.*

92. *Id.* at 213, 214. Equitable restitution in the form of constructive trust or equitable liens is permitted when "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213. The Supreme Court stated that "[t]he basis for [the plan's] claim is not that [the beneficiaries] hold particular funds that, in good conscience, belong to [the plan], but that [the plan is] contractually entitled to *some* funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon [the beneficiaries]." The *Knudson* opinion focused on "in the defendant's possession" and glossed over "belonging in good conscience to the plaintiff." Because of this gloss in *Knudson*, the

possession, then the application of a lien does not impose personal liability on the defendant. However, the converse would still allow a plan to impose personal liability on a beneficiary because it could seek funds to which the plan is not, in good conscience, entitled. In interpreting *Knudson*, Judge Wilkinson of the Fourth Circuit Court of Appeals stated that "[t]he Supreme Court's most recent § 1132(a)(3) decisions demonstrate how the absence of unjust possession is fatal to an equitable restitution claim."[93] Thus, it is not enough that the defendant possess the funds, but that possession must be unjust.

The Supreme Court in *Knudson* did not rely on the negative element of equitable restitution. Rather, it only relied on the positive element that the funds had to be in the defendant's possession.[94] However, the fact that the money is in the defendant's possession is only a factor to determine whether the action imposes personal liability on the defendant. That is why it is clear that if the money is not in the defendant's possession, then the action will always seek to impose personal liability on the defendant.

The Supreme Court's analysis stopped here, but its analysis is incomplete because it ignores the requirement that the plan must be, in good conscience, entitled to the particular funds that it identified.[95] The Court must look to other factors to determine whether the action seeks to impose personal liability on the defendant. Other factors may include the basis of the claim; what property is physically sought, and if money is sought, how the amount is gauged; and whether either party has been unjustly enriched.[96] While *Knudson* is what most would consider a landmark case in the federal common law of ERISA, its application by subsequent courts has been incomplete because they fail to analyze the negative element of the Supreme Court's test.[97]

Sereboff opinion similarly glossed over the "belonging in good conscience to the plaintiff" element.

93. LaRue v. DeWolff, Boberg & Assocs., 450 F.3d 570, 575 (4th Cir. 2006), *vacated and remanded on other grounds*, 128 S. Ct. 1020 (2008). The Supreme Court held that 29 U.S.C. § 1132(a)(3) does not limit recovery against a fiduciary to participants of the entire plan. Rather, an individual participant in a plan has an action for lost profits of a defined contribution plan where there has been a breach of trust.

94. *Knudson*, 534 U.S. at 213, 214.

95. *See supra* note 92 and accompanying text.

96. These are just a few suggestions of factors at which the Supreme Court should look when asking this essential question: whether the relief sought is equitable.

97. As a principal example, the analysis in *Sereboff* never asked whether the plan was, in good conscience, entitled to the funds in the plan.

After several years of confusion among the circuits in their attempts to interpret *Knudson*,[98] the Supreme Court in *Sereboff v. Mid Atlantic Medical Services, Inc.*, allowed an equitable lien in favor of the plan for $74,869.37.[99] The situation was virtually identical to that in *Knudson* except the funds were disbursed to the Sereboffs instead of to a special needs trust.[100] Mr. and Mrs. Sereboff recovered $750,000 in a settlement from the third party tortfeasor.[101] Instead of focusing on the federal common law of ERISA, and conceptually interpreting and refining the new test propounded in *Knudson*, the Supreme Court relied heavily on *Barnes v. Alexander*,[102] a case completely removed from ERISA but focused on equitable liens by agreement.[103]

The Court haphazardly relied on *Knudson* to allow an equitable lien because the property was in the defendant's possession, but, like *Knudson*, the Court did not adequately discuss the negative element of the *Knudson* test.[104] Instead of following the rule propounded in *Knudson*, the Supreme Court followed the facts: because the money is in the Sereboffs' possession, the relief is equitable.[105] Because the Supreme Court failed to analyze the negative element of the *Knudson* test, the Court's application in *Sereboff* is myopic at best. Even when the money is in the beneficiary's possession, the relief sought is still legal if it imposes personal liability on the defendant, and thus granting the relief violates the statutory limitation.

B. An ERISA Fiduciary May Seek Only Equitable Remedies.

The Supreme Court has stated that ERISA's enforcement scheme is comprehensive, and the courts should hesitate to modify it.[106] While the

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98. *See* Gates v. Hartford Life Group Ins. Co., 2006 WL 2981191 (S.D. Tex. 2006) (stating that "the authorities to which Plaintiff cites justifiably bemoan the tangled state of ERISA jurisprudence").

99. Sereboff v. Mid Atlantic Medical Servs., 547 U.S. 356, 360 (2006).

100. *Id.*; *compare Knudson*, 534 U.S. 204 (2002).

101. *Id.*

102. *Id.* at 363-64 (relying on Barnes v. Alexander, 232 U.S. 117 (1914)).

103. *See infra* Part III.B.1 for discussion on the distinctions between *Barnes* and *Sereboff*.

104. This Comment will fully address the implications of *Sereboff* on *Knudson*, *Mertens*, and general principles of equity in Part III.

105. *Sereboff*, 547 U.S. 356, 362 (holding that "[the] impediment to characterizing the relief in Knudson as equitable is not present here").

106. "'ERISA is a "comprehensive and reticulated statute," the product of a decade of congressional study of the Nation's private employee benefit system.'" *Knudson*, 534 U.S. at 209 (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993) (citation omitted)). "We have therefore been especially 'reluctant to tamper with [the] enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text."

statute is comprehensive in some respects, its enforcement is exceedingly vague. The federal courts have long struggled to interpret the meaning of "other appropriate equitable relief."[107] ERISA provides, in pertinent part, that a fiduciary may bring a "civil action . . . to obtain other appropriate equitable relief . . . ."[108] In the Supreme Court's first attempt to define appropriate equitable relief, the Court said that "[e]quitable relief must mean something less than all relief."[109] Courts must give proper effect to the words chosen by Congress to effectuate its intent, and here, the words chosen by Congress are words of limitation.[110] Accordingly, legal relief is impermissible under the statute. Furthermore, the Supreme Court explained in *Knudson*, "the term 'equitable relief' . . . must refer to those categories of relief that were typically available in equity."[111]

The question left remaining, then, is what relief was typically available in equity and what relief was typically available at law? The *Knudson* court characterized the two different types of relief as restitution, but restitution can be legal or equitable.[112] Legal restitution sought to "impose personal liability" on the beneficiary for a contractual obligation to pay money while equitable restitution sought to obtain money or property clearly traceable and identified as belonging in good conscience to the plan.[113] The latter is the only kind of restitution available for Employee Benefit Plans under ERISA, and the Supreme Court should recognize the importance of limiting a fiduciary's

Knudson, 534 U.S. at 209 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985)).

107. 29 U.S.C. § 1132(a)(3); *see Mertens*, 508 U.S. 248 (1993), FMC Med. Plan v. Owens, 122 F.3d 1258, 1259 (9th Cir. 1997), Pacificare Inc. v. Martin, 34 F.3d 834, 835 (9th Cir. 1994), Dugan v. Nickla, 763 F. Supp. 981 (N.D. Ill. 1991).

108. 29 U.S.C. § 1132 states: "A civil action may be brought ... (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other *appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . ." 29 U.S.C. § 1132 (emphasis added).

109. *Mertens*, 508 U.S. at 258 n.8 (quotation marks and emphasis omitted).

110. Professor Colleen E. Medill has opined that the Supreme Court's interpretation of the word "equitable" as a word of limitation was in error. She would have the Court read "appropriate equitable relief" as including in that word the "fusion" of law and equity in the American court system today. Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief under ERISA Section 502(A)(3)*, 39 J. MARSHALL L. REV. 827, 853 (2006) (quoting John H. Langbein, *What ERISA Means by "Equitable*, 103 COLUM. L. Rev. 1317, 1365 (2003)).

111. *Knudson*, 534 U.S. at 209 (quotation marks and emphasis omitted).

112. *Id.* at 212-14.

113. *Id.*

remedy to equitable remedies and should refuse to allow legal remedies like those in *Sereboff*.

III. THE REMEDY IN *SEREBOFF* WAS LEGAL, NOT EQUITABLE

Equitable relief, according to the Supreme Court, includes "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[114] *Mertens* did not conclusively determine which actions are and are not allowed, but it did provide a basis for interpreting the phrase "other appropriate equitable relief."[115] If a fiduciary seeks any relief other than equitable relief, then the court lacks subject matter jurisdiction.[116] Instead of actually seeking equitable relief, the petitioner in *Mertens* sought compensatory damages, or money damages, which is "the classic form of legal relief."[117] Therefore, as in *Mertens*, the Court should have found that the plan in *Sereboff* sought nothing other than compensatory damages—relief for all losses the plan sustained because of the injury—which is legal relief. Because the plan did in fact seek legal relief, the district court lacked subject matter jurisdiction.[118]

The distinction between legal and equitable remedies is necessary in determining whether the plan can recover and whether a federal court has subject matter jurisdiction. Thus, a full discussion requires dialogue of the distinctions between both remedies to determine whether the "federal common law" has adequately honored that distinction and, in an attempt to allow the plan to recover, allowed legal remedies to cross-dress as equitable remedies.

114. *Mertens*, 508 U.S. at 256.

115. *Id.* at 255-59.

116. 28 U.S.C. § 1331 requires subject matter jurisdiction to arise under a federal question. Because the federal law allowing a claim to be brought inherently limits those claims to equitable claims, the Court lacks federal subject matter jurisdiction over the legal claims. Diversity of citizenship, under 28 U.S.C. § 1332, does not provide subject matter jurisdiction because the action arises under federal law and not state law. In diversity cases, the Courts apply state law to settle the claims when there is complete diversity. In this case, there would be no state law to apply because the claim arises under federal law.

117. *Mertens*, 508 U.S. at 255 (emphasis omitted); *see also* LaRue v. DeWolff, Boberg & Assocs., 450 F.3d 570, 575 (4th Cir. 2006), *vacated on other grounds*, 128 S. Ct. 1020 (2008).

118. *See supra* note 116.

A. Traditional Equitable Remedies

A common maxim of equity provides that "[e]quity will not suffer a wrong without a remedy."[119] The courts created equitable remedies because the rigidness of the legal system sometimes left a party without a remedy in a specific case: "Wherever a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation, though no similar relief has been given before."[120] In order to rectify the situation and provide for citizens who had suffered a wrong[121] against them, the King gave the chancellor the responsibility of deciding cases of equity.[122] Traditionally, equitable relief is available *only* where legal relief is not adequate.[123]

When considering remedies in general, Dan Dobbs posits that "[t]he two major remedial questions are (1) what remedy or combination of remedies can or should be awarded? and (2) what is the measure, or the scope, of the

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119. HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 76 (2d ed. 1948); *see also* Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29, 29 (1993) ("This creativity has allowed equity courts to grant relief not otherwise supported by precedent. Accordingly, an equity court may reform contracts, enforce future crop liens, order the sale of land for reinvestment purposes, compel an accounting and impound the proceeds for damages to property that will pass to a remainderman, establish constructive trusts, mandate signatures on documents, order the enactment of taxes, and decree structural changes in governmental institutions." (footnotes omitted)).

120. MCCLINTOCK, *supra* note 119, at 76. The concept of equity courts was that they could devise new equitable remedies to meet new situations with which they were faced. McClintock goes on to say that the "absence of precedent for the particular relief sought is no bar to action." *Id.* at 77. In this case, no court has recognized the need to use special verdict forms to apportion judgments between the types of compensatory damages and limit the plan's lien to medical expenses under ERISA. However, under Medicaid, the same situation was presented, and the Supreme Court said in *Ahlborn* that any other result would be absurd and fundamentally unjust. *See infra* Part IV.A.

121. *See* Whitaker and Co. v. Sewer Imp. Dist. No. 1 of Dardanelle, Ark., 221 F.2d 649, 652 (8th Cir. 1955) ("The required basis for application of this maxim is the presence of a 'wrong'. 'Wrong', as used here, does not mean a moral duty only, unconnected with legal obligations. A court of equity cannot, by avowing that there is a right but no remedy known to law, create a remedy in violation of law, or even without the authority of law. What then, are the 'legal obligations' due appellant, the violation of which constitutes a 'wrong' giving him a right to avail himself of this maxim?" (quotation marks and citations omitted)).

122. MCCLINTOCK, *supra* note 119, at 3. "The power of the chancellor as an equity judge and his jurisdiction to give relief in those cases where the ordinary forms of the common law were not adequate to meet the case were both derived from the prerogative of the king to administer justice between his subjects unfettered by the restrictions of ordinary procedure." *Id.*

123. *See, e.g.*, Goldschmidt Thermit Co v. Primos Chemical Co., 225 F. 769 (E.D. Pa. 1915); Gaines v. Miller, 111 U.S. 395 (1884).

remedy chosen?"[124] When a plan seeks relief, the first question is easily answered by saying that the only remedies that can be awarded are equitable remedies. The second question, however, is more difficult. Each traditional equitable remedy available must answer the second question: "[W]hat is the measure, or the scope, of the remedy?"[125] The court must answer this question before conclusively determining whether the relief sought is equitable.

The difficulty here relates to the restitution and the nature of the remedy because even though a plaintiff can seek restitution, restitution can be a legal remedy.[126] Accordingly, there are four traditional restitutionary remedies in equity: constructive trust, equitable lien, subrogation, and accounting for profits.[127] The court may "choose among the equitable remedies to best reflect the equities of the particular case and to best effectuate remedial policies as they apply to the particular facts."[128]

While the court has the choice of which equitable remedy to impose, one must note that all of these remedies are restitutionary. The remedies are invoked for the same reason: to prevent unjust enrichment.[129] Furthermore, modern courts have upheld the concept that for a remedy to be equitable, it must not seek to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession, which

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124. DOBBS, *supra* note 49, at 1.

125. *Id.*

126. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002) (classifying restitution as legal or equitable).

127. DOBBS, *supra* note 49, at 587.

128. *Id.* at 588.

129. *Id.* at 597, 601. *See, e.g.*, Department of Army v. Blue Fox, Inc., 525 U.S. 255, 262-63 (1999) ("An equitable lien does not give the plaintiff the very thing to which he was entitled; instead, it merely grants a plaintiff a security interest in the property, which [the plaintiff] can then use to satisfy a money claim, usually a claim for unjust enrichment." (citations and quotation marks omitted)); Goodwin v. C.N.J., Inc., 436 F.3d 44, 50 (1st Cir. 2006) ("The remedy of restitution is available only when equitable considerations demand that a party disgorge an undeserved benefit or gain."); Leisure Resort Tech., Inc. v. Trading Cove Assocs., 889 A.2d 785, 797 (2006) ("A plaintiff may seek restitution if the defendant has committed a civil wrong, usually a tort or breach of contract, and the plaintiff prefers to recover the amount the defendant was enriched by her wrongful conduct as opposed to damages."); Flaherty v. Borough of Naugatuck, No. CV054004400S, 2007 WL 586788, at *3 (Conn. Super. Ct. Feb. 2, 2007) ("Unjust enrichment applies wherever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract."); *see also* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2098 (2001) ("[R]estitution might be defined . . . by reference to a prevalent (if not exclusive) feature of restitution claims: gain obtained by the defendant, usually at the plaintiff's expense.").

in good conscience belongs to the plaintiff.[130] Modern courts seem to ignore the other criteria set forth in the common law.[131] The common law provided relief in equity to those who have been wronged and against those who have been unjustly enriched. The courts gloss over the qualification of unjust enrichment and the measure of relief. The bottom line is that when the plaintiff gauges his recovery based on his loss, rather than the defendant's gain, then the relief sought is, at core, legal, not equitable.[132]

In order to determine the type of remedy imposed in the *Sereboff* case, this Comment will consider constructive trusts, equitable liens, replevin, detinue, and assumpsit, because the federal common law, as it relates to ERISA, is preoccupied with those restitutionary remedies, rather than ejectment, subrogation, and accounting for profits.

1. Constructive Trust

The constructive trust is a remedy for unjust enrichment.[133] A constructive trust arises "[w]here a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it . . . ."[134] Contrasted with an equitable lien, a constructive trust gives the plaintiff title to the specific property by which the defendant has been unjustly enriched, while the equitable lien gives only a security interest in the property.[135] At common law, the constructive trust was modeled after the quasi-contract legal claim.[136] According to Dobbs, the difference between the quasi-contract and the constructive trust is that the quasi-contract seeks to obtain money and "does

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130. *See Knudson*, 534 U.S. at 213-14.

131. *See, e.g.*, Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356, 365 (2006).

132. *See* LaRue v. DeWolff, Boberg & Assocs., 450 F.3d 570, 575 (4th Cir. 2006), *vacated on other grounds*, 128 S. Ct. 1020 (2008). See also Sherwin, *supra* note 129, at 2098 n.66 for a general recognition of debate regarding whether restitution should be based on benefit or harm. It would seem, particularly in ERISA cases, that restitution must be based on the unjust benefit received by the beneficiary. If legal restitution were permitted, then one could argue that legal restitution could possibly be based on the harm done to the plan, but legal restitution is proscribed by statute. Equitable restitution, however, is more likely to rely on the concept of unjust enrichment (as the Fourth Circuit did in *Larue*) because equitable restitution is based on the concepts of flexibility and justice. Certainly, in Medicaid cases, the lien resembles equitable restitution for an unjust enrichment of the beneficiary. The lien is also limited to medical expenses recovered by the beneficiary in a settlement or judgment. *See infra* Part IV.A.

133. DOBBS, *supra* note 49, at 597.

134. RESTATEMENT (FIRST) OF RESTITUTION § 160 (1937).

135. DOBBS, *supra* note 49, at 588, 589, 603.

136. *Id.* at 590.

not require the plaintiff to identify any particular asset as rightly 'belonging' to him."[137]

In ERISA lien cases, the plan always seeks to obtain money because the lien is levied against a judgment or settlement from a tortfeasor. Unless the plan can identify a particular asset that rightly belongs to it, then the proper cause of action is not a constructive trust, but rather a quasi-contract claim. If the Court had to choose between a constructive trust and a quasi-contract claim in the *Sereboff* case, the Court should have determined that the action is a quasi-contract claim because the plan cannot claim the beneficiary has the particular asset in his possession; the plan has a different asset and only seeks to obtain money.

Dobbs then distinguishes the constructive trust and quasi-contract further by saying that "[w]here the quasi-contract plaintiff wins a simple money judgment, enforceable by execution, the constructive trust plaintiff who proves his claim by clear and convincing evidence wins an *in personam* order that requires the defendant to transfer legal rights and title of specific property or intangibles."[138] This statement is consistent with the Supreme Court's analysis in *Mertens* that money damages are the archetypal legal remedy.[139] The danger is evident where the property that the plaintiff seeks is nothing more than money, in that a constructive trust and a quasi-contract claim are virtually indistinguishable.[140] The particular money paid by the plan is not in the hands of the beneficiary because it was paid to the healthcare provider. The particular money in the hands of the beneficiary is money received from a third-party tortfeasor. Further, the particular money in the hands of the beneficiary from a third-party tortfeasor is earmarked for pain and suffering, lost wages, medical expenses, permanent injury, etc. Thus, it appears that the plan is seeking not to recover a particular asset that rightly belongs to it from the beneficiary when it seeks to recover funds earmarked for pain and suffering, lost wages, permanent injury, etc., but the plan in reality seeks to recover money from the beneficiary's possession. The appropriate claim for such recovery is quasi-contract.

If the plan seeks nothing more than money held for the plan by the beneficiary, one must answer the question: what happens if the beneficiary

137. *Id.*

138. *Id.* at 590-91 (footnotes omitted).

139. Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).

140. The distinction between a constructive trust and a quasi-contract claim is virtually indistinguishable when money is the only award for both because the same thing occurs in both situations; that is, the defendant gives the plaintiff money. It is even more indistinguishable when the money involved is not traceable to a particular fund such as a funds in a particular trust or funds that are earmarked for a particular purpose.

squanders the money? If the beneficiary no longer possesses the property that the plan claims, the beneficiary may still be personally liable under a creditor claim.[141] This, according to *Knudson*, is also a legal claim because it seeks to impose personal liability on the beneficiary.[142] Thus, since the plan does not seek title for a particular asset that rightly belongs to it, and the remedy is not to require the beneficiary to convey title of that asset to the plan, the relief sought in *Sereboff* was not a constructive trust.[143] Instead, courts couch the relief as an equitable lien.[144]

2. Equitable Lien

At common law, the term equitable lien is "intensely undefined."[145] The equitable lien, like the constructive trust, is a mechanism of equitable restitution and arises in cases of unjust enrichment.[146] Equitable liens differ from constructive trusts in that, in some cases, the constructive trust can exact more than the amount of restitution, while the equitable lien is "proportioned to the unjust enrichment."[147] The use of an equitable lien usually is limited to when a constructive trust is too excessive.[148] For example, if D obtains money from P and uses it to purchase improved land, then P has a constructive trust and can force D to convey title to P; however, if D obtains money from P and uses it together with his money to purchase improved land, then P only has an equitable lien against the property because for P to

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141. DOBBS, *supra* note 49, at 591-92.

142. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213, 214 (2002).

143. Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356, 360 (2006) ("Mid Atlantic [sought] to collect from the Sereboffs the medical expenses it had paid on their behalf.").

144. *Id.* at 363 ("[Mid Atlantic] alleged breach of contract and sought money, to be sure, but it sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the Sereboffs' assets generally, as would be the case with a contract action at law.").

145. MCCLINTOCK, *supra* note 119, at 319-20 (quoting Brundson v. Allard, (1859) 121 Eng. Rep. 8, 11 (Q.B.) (opinion of Erle, J.)). Even modernly, the Court would not understate the confusion surrounding equitable liens by saying that the concept is intensely undefined. However, McClintock attempts to define an equitable lien as "a charge which will be enforced in equity against specific property, though there is no valid lien at law; equity imposes liens either to carry out the intention of the parties to give security or to prevent injustice, regardless of intent." *Id.* at 319.

146. RESTATEMENT (FIRST) OF RESTITUTION § 161 ("Where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises.").

147. DOBBS, *supra* note 49, at 603.

148. *Id.* at 602.

receive the entire value of the land and improvements would be excessive.[149] In other words, the lien is limited to the amount P contributed to the property.

The foregoing examples provide some guidance in the analysis in ERISA cases, but they still leave the question unclear. The plan gives the beneficiary funds to pay for medical expenses and seeks to impose a lien against the beneficiary's judgment. The judgment contains compensatory damages, including several items for which the plan has failed to compensate the beneficiary (pain and suffering, lost wages, permanent loss, future medical expenses, loss of consortium, etc.). These damages are funds belonging in good conscience to the beneficiary, not the plan. The beneficiary is also compensated for past medical expenses paid by the plan. These damages are funds belonging, in good conscience, to the plan.

While the example is helpful, it does not help decide the situation presented in *Sereboff*. In *Sereboff*, the beneficiary did not combine his money with the money provided by the plan to obtain the judgment. Rather, the plan paid that money to the healthcare provider and then sought a lien against the beneficiary's judgment.[150] In other words, the Plan did not contribute to the actual judgment. In the Dobbs examples above,[151] the equitable lien is equivalent to the amount that the plan paid the beneficiary because that is the amount by which the beneficiary has been unjustly enriched. However, in *Sereboff*, the amount that the plaintiff paid on behalf of the beneficiary was not necessarily equivalent to the amount by which the beneficiary was unjustly enriched.

The beneficiary was unjustly enriched only by the amount that he received from the tortfeasor as compensation for medical expenses, because the plan had already compensated the defendant for that amount. But the plan did not contribute any funds to the beneficiary for pain and suffering, lost wages, permanent injury, future medical expenses, etc. The plan only contributed funds to the beneficiary for medical expenses. The beneficiary ought not to be able to receive compensation for medical expenses he has not paid, and likewise, the plan should not be able to receive compensation for other damages for which it has not contributed.[152]

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149. *See id.*

150. Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356, 360 (2006).

151. *See supra* note 149 and accompanying text.

152. A point of clarification: a beneficiary should be able to recover from the tortfeasor even though the plan has paid for his medical expenses. Generally, under the collateral source rule, a plaintiff should not be precluded from recovering those medical expenses. However, pursuant to ERISA and the agreement between the plan and the beneficiary, it would be unjust to allow the beneficiary to keep those medical expenses that he has contracted to repay. However, the contract cannot be enforced in an action for assumpsit or

In *Sereboff*, the Supreme Court considered the *Knudson* case and concluded that the difference in the two cases was the element of possession.[153] Without regard for the general principles of equity, the requirements for an equitable lien, and the limitations on the types of relief generally available, the Court allowed the plan to impose an equitable lien for the full amount of benefits paid to the beneficiary.[154] However, the amount of the judgment that was attributable to medical expenses is unclear. If the tortfeasor is liable for $75,000 of the beneficiary's medical expenses and the plan paid it on his behalf, then the plan may seek an equitable lien in the amount of $75,000. In order to determine if the lien is in fact equitable, the district courts should require the jury to fill out a special verdict form attributing the judgment to certain compensatory damages. If the jury determines that, for whatever reason, the tortfeasor is liable only for $50,000 in medical expenses, the plan may seek an equitable lien for $50,000.

As in constructive trusts, if a beneficiary squanders the money or for some reason does not have that money in his or her possession, then the beneficiary could be held personally liable under creditor/debtor law, which is a legal remedy.[155] If, in the *Sereboff* case, the jury attributed $50,000 to medical expenses and the plan sought a $75,000 lien, then the relief sought would be legal for two reasons. First, the $25,000 obtained in the judgment over the amount attributed for medical expenses ($50,000) does not belong in good conscience to the plan, and, second, the plan seeks to impose personal liability on the beneficiary for an amount over the amount by which the beneficiary was unjustly enriched. By allowing the plan to recover $25,000 that it is not entitled to receive, the federal courts are providing an unjust result.

B. *Traditional Legal Remedies*

While there are several forms of legal remedies, legal restitution in its relevant form of assumpsit, replevin, and detinue are the most applicable to this discussion. In addition, damages, which according to *Mertens* are the archetypal legal remedy,[156] are also relevant to this discussion. In fact, if the

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an action generally in contract because both of those remedies are legal in nature and thus prohibited by 29 U.S.C. § 1132(a)(3).

153. *Sereboff*, 547 U.S. at 362-63.

154. The Sereboffs settled their suit against the third party tortfeasor for $750,000.00. Mid Atlantic claimed an equitable lien in the amount of $74,869.37, which was the total amount that Mid Atlantic paid on behalf of the Sereboffs. *Id.* at 360.

155. *See* DOBBS, *supra* note 49, at 591.

156. Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).

remedy provided in *Sereboff* is considered restitution, the analysis continues by asking whether the restitution is legal or equitable. The restitution in *Sereboff* is not equitable,[157] but legal in nature, a remedy that is specifically prohibited under 29 U.S.C. § 1132(a)(3).[158] If the remedy is not legal restitution, then it is properly labeled as damages, the archetypal legal remedy.

1. Assumpsit and Replevin/Detinue

The law recognizes that in some contract cases, expectation and reliance damages are not sufficient to accomplish justice.[159] The remedy of restitution in contract cases usually takes the form of recovering the amount or the specific item by which the breaching party has been unjustly enriched when the non-breaching party has already conferred a benefit.[160] Under common law, legal restitution took two main forms: where the plaintiff had legal title, and where the plaintiff did not have legal title but claimed contractual entitlement. While ejectment, replevin, and detinue were utilized when dealing with specific goods or chattels,[161] assumpsit was typically a contract that was either express or implied by the conduct of the parties.[162] The following analysis will show that the actions dealt with in this Comment more closely resemble an action in assumpsit than an equitable lien.

The plaintiff could recover money or property under the legal action of replevin or detinue if a specific object is considered property or chattel, the

157. *See supra* Part III.

158. *See supra* notes 46-51 and accompanying text.

159. Hansen Bancorp, Inc. v. United States, 367 F.3d 1297, 1309 (Fed. Cir. 2004) (stating that "[r]estitution has been characterized as "a fall-back position" for the injured party who is unable to prove expectancy damages").

160. RESTATEMENT (SECOND) OF CONTRACTS § 370 (1981) (stating that "[a] party is entitled to restitution . . . only to the extent that he has conferred a benefit on the other party by way of part performance or reliance").

161. DOBBS, *supra* note 49, at 573. Ejectment, Replevin, and Detinue are the three main types of restitution when the Plaintiff has legal title.

162. DOBBS, *supra* note 49, at 571. "Assumpsit was the common law form by which contract claims were redressed. Sometimes the contract would be express, sometimes implied by the parties' action, by in either event a genuine contract. However, the assumpsit action also came to be used when the parties had no contract at all, so long as the plaintiff could convince the Court that he ought to recover sometime from the defendant as a matter of justice or good conscience." *See also*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining assumpsit as "(1) An express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another . . . or (2) A common-law action for breach of such a promise or for breach of a contract").

title to which belongs in good conscience to the plaintiff.[163] Replevin was originally used to "regain chattels that had been wrongfully distrained."[164] Unlike replevin, "detinue was commonly used in bailment situations where the bailee refused to return the bailed goods."[165] Detinue typically required that the duty to return the bailment be grounded in contract.[166] This action could arise in several situations; for example, when the defendant wrongfully acquired the property, when the defendant rightfully acquired the property and wrongfully held it, or when the defendant possessed the property without tortious obtainment.[167] The main difference between replevin and detinue is thus the manner in which the property was obtained.[168]

Assumpsit differs from replevin and detinue in that it is not limited to cases that involve title, ownership, or possession; rather, assumpsit "could award restitution for money, goods, or services."[169] According to Dobbs, legal restitution in assumpsit can be applied to several fact patterns; yet only one merits mention here: *Money paid for the defendant's use.*[170] Generally, the plaintiff need only pay the defendant's debt, and when the defendant asks for the plaintiff's help (i.e. defendant asks plaintiff to pay his debt), the plaintiff is entitled to restitution.[171] If the plaintiff is not an officious intermeddler, the property given was not gratuitous, and the defendant chooses to contract/accept the funds (restitution in this situation), under the

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163. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining replevin as "(1) An action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it. . . . (2) A writ obtained from a court authorizing the retaking of personal property wrongfully taken or detained" and also defining detinue as "[a] common-law action to recover personal property wrongfully taken by another").

164. DOBBS, *supra* note 49, at 574. *See also* Black's Law Dictionary (8th ed. 2004) (defining the verb distrain as "[t]o seize (goods) by distress, a legal remedy entitling the rightful owner to recover property wrongfully taken").

165. DOBBS, *supra* note 49, at 573.

166. *Id.*

167. *Id.* at 574.

168. This distinction is much like the difference between larceny and embezzlement. The main difference between the two lies in the question of whether there was a trespass in the taking. If there was no trespass in the taking, then the property was lawfully obtained and there is no larceny. However, even though the defendant obtained the property lawfully, if the bailee misappropriates the property with *animus furandi*, then he will be guilty of embezzlement. Embezzlement was created to fill the empty gap in larceny and to punish those who would gain lawful possession and subsequently misappropriate the bailor's property. Detinue seems to fill the same gap for Replevin.

169. DOBBS, *supra* note 49, at 576-577.

170. *Id.* at 581-582.

171. *Id.*

rule for *money paid for the defendants use*, the plaintiff's claim qualifies for legal restitution.[172]

Consider the situation of ERISA liens and specifically in *Sereboff*.[173] The situation described by Dobbs remains unchanged. The plan pays a debt incurred by the beneficiary, the beneficiary recovers funds that it agreed to repay under the "acts of third parties" provision, and the plan is entitled to payment of those funds, that is, restitution.[174] The restitution is based upon a contract much like the one in *Barnes v. Alexander*,[175] yet is significantly different. In *Barnes*, the Supreme Court upheld "the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing."[176] Justice Holmes "concluded that Barnes' undertaking 'create[d] a lien' upon the portion of the monetary recovery due Barnes from the client, which Street and Alexander[177] could 'follow . . . into the hands of . . . Barnes,' 'as soon as [the fund] was identified."[178] The Supreme Court in *Sereboff* presumed that a beneficiary's judgment against a tortfeasor is sufficient to constitute a specific object and thus to qualify for an equitable lien.[179] The Court also

172. Cotnam v. Wisdom, 104 S.W. 164 (1907). *Cotnam* is the typical casebook contract case illustrating the hurdles over which the plaintiff must jump in order to obtain a judgment for restitution in general. It's worthy of noting that Cotnam did not distinguish between legal and equitable restitution and the hurdles enunciated in that case apply equally to both.

173. *See supra* note 13-21 and accompanying text.

174. Observe that this Comment is not arguing that the plan is not entitled to restitution, rather, this Comment is arguing that restitution in the full amount of benefits paid to the beneficiary from a monetary judgment that represents less than full recovery is a legal remedy and not authorized by ERISA. An equitable lien, limited to the amount of the benefits recovered for medical expenses, is permissible.

175. Barnes v. Alexander, 232 U.S. 117 (1914) (relied upon by the Supreme Court of the United States in *Sereboff*, 547 U.S. at 363-64). Street and Alexander were attorneys who were entitled to a portion of the entire judgment because they worked on the case and the main attorney on the case, Barnes, made an agreement that they would be paid one third of the one fourth that the judgment in that case.

176. *Barnes*, 232 U.S. at 121.

177. *Id.* at 123.

178. Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356, 364 (2006) (quoting *Barnes*, 232 U.S. at 121, 123) (citation omitted).

179. *Id.* at 364-65. This Comment posits that the Supreme Court presumed that the judgment was a specific object because the court never answered the question what a specific object is. The Supreme Court simply said "[m]uch like Barnes' promise to Street and Alexander, the "Acts of Third Parties" provision in the Sereboffs' plan *specifically identified a particular fund, distinct from the Sereboffs' general assets*—'[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise)'—and a particular share of that fund to which Mid Atlantic was entitled—'that portion of the total recovery which is due [Mid Atlantic] for benefits paid' " (emphasis added). All the court said was that a

dismissed the tracing requirement that is typically required for equitable liens because the Court asserts that equitable liens and equitable liens by agreement "are different species of relief."[180] But they are not so different that they alter the requirements set forth in *Knudson*;[181] that is, regardless of whether the equitable lien is by agreement, the lien cannot impose personal liability on the beneficiary of the plan.[182] If it does impose personal liability on the beneficiary of the plan, then the remedy is legal and thus prohibited.[183]

While the Supreme Court opined that the ERISA equitable lien is identical to the equitable lien in *Barnes*, the Court failed to fully analyze the equitable lien in *Barnes* against the purported equitable lien in *Sereboff*. In *Barnes*, the plaintiffs performed work for the funds that they earned under an agreement.[184] In *Sereboff*, the plaintiffs paid money to a third party for the benefit of the defendants.[185] The Court should have asked whether the situation looks more like an equitable lien by agreement or an action for assumpsit. The line between the two is fine and far from bright, but, in the absence of brightness, the federal courts should illuminate it by analyzing that line completely.

If an equitable lien was created by the equity courts in order to provide redress for persons who have a loss against another who has an unjust gain, then the ERISA lien situation qualifies to a limited extent.[186] However, once the plan seeks relief beyond that limited extent, then the relief becomes legal; that is, it becomes an action for assumpsit. An ERISA plan can impose a lien against a beneficiary's judgment to the extent that the beneficiary recovered medical expenses from the tortfeasor. If the lien exceeds this limitation and

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specific object is "a particular fund, distinct from the Sereboffs' general assets." However, if the plan is not entitled to the particular fund distinct from the Sereboffs' assets, then it still may not claim an equitable lien under the *Knudson* rule. For example, if the plan identified one of several bank accounts held by the beneficiary, it would be a particular fund, distinct from the Sereboffs' general assets, but the plan would not be entitled to it. Since the plan is not entitled to that bank account, the lien would impose personal liability on the beneficiary of the plan. Such a claim is a legal remedy prohibited by ERISA.

180. *Id.* The Supreme Court further stated that "*Barnes* confirms that no tracing requirement of the sort asserted by the Sereboffs' applies to equitable liens by agreement or assignment . . . ." Leaving open the question of whether a tracing requirement of another sort may exist. Specifically, perhaps a tracing requirement exists that mandates that the plaintiff be particularly entitled to the fund that it identifies.

181. *See supra* notes 89-93 and accompanying text.

182. *Id.*

183. *Id.*

184. *Barnes*, 232 U.S. at 119-20.

185. *Sereboff*, 547 U.S. at 360 (stating specifically that "the plan paid the couple's medical expenses").

186. *See supra* Part III.A.2.

seeks money that the beneficiary received as compensation for other injuries such as lost wages, future medical expenses, loss of consortium, etc., then it will be considered a legal action for assumpsit. All of this hinges on the test set forth by the Supreme Court in *Knudson.*

However, as discussed earlier, that test is incomplete without the element that the plaintiff be, in good conscience, entitled to the funds.[187] Thus, the test should be summarized as follows: *restitution will lie in equity when it seeks to restore the plaintiff particular funds or property in the defendant's possession that the plaintiff is in good conscience entitled to. Restitution will not lie in equity but in law when the plaintiff seeks to impose personal liability on the defendant.*

Since the plan is not in good conscience entitled to recover money received by the beneficiary from the tortfeasor specifically labeled as something other than medical expenses, the action for restitution does not lie in equity, but in law. If the plan were allowed to seek legal remedies, then the plan would be able to claim restitution under the theory of assumpsit alleging money paid for defendant's use. But this is not the case. The plan cannot seek legal remedies and because the relief sought is legal, then the court should dismiss the case for failure to state a claim for which relief can be granted.[188]

2. Damages

The difference between restitution in general and an award for damages is of great importance here because, as the *Mertens* court stated, damages are the "classic form of legal relief."[189] According to Dobbs, "[a] damages award focuses on the victim's loss and seeks compensation (or partial compensation); the restitution award focuses on the breacher and seeks to prevent his unjust enrichment by forcing restitution of gains he received under the contract."[190] Thus, for restitution, the question is not one of how much the plaintiff lost, but of how much the defendant gained unjustly. When a plaintiff gauges his recovery not by the value of the defendants gain, but by the value of his own loss, the measure is traditionally legal.[191] Other

187. *See supra* note 92 and accompanying text.

188. FED. R. CIV. P. 12(b)(6).

189. Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993) (emphasis omitted).

190. 3 DOBBS, *supra* note 49, at 160.

191. LaRue v. DeWolff, Boberg & Assocs., 450 F.3d 570, 575 (4th Cir. 2006), *vacated on other grounds*, 128 S. Ct. 1020 (2008). The Fourth Circuit stated that the impediment that prohibited recovery in *Knudson*, that is, possession, was absent from *Sereboff*, but was "present in this case, and it precludes plaintiff from recovering under an equitable restitution theory. Plaintiff does not allege that funds owed to him are in defendants' possession, but instead that these funds never materialized at all. He therefore gauges his recovery not by the

requirements imposed by the courts and developed under the federal common law limit the recovery to money that is specifically identifiable and in the possession of the beneficiary.[192]

In this case, the Sereboffs' judgment was their property.[193] Mid Atlantic must, according to the federal common law, specifically identify property within the possession of the beneficiary and that property must belong in good conscience to the plan. However, just because the plan identifies the judgment recovered from the tortfeasor does not mean that that identification is appropriate. An appropriate identification would be limited to the amount of medical expenses that the beneficiary recovers from the tortfeasor. Thus, before the federal courts allow ERISA liens against the property of a beneficiary, the courts should first apply this appropriateness test: *Did the plan specifically identify property within the possession of the beneficiary to which the plan is in good conscience entitled?*

Courts have presumed that the identified fund can appropriately be the entire judgment without considering the adverse effects of that presumption.[194] The judgment is the property of the beneficiary,[195] and the plan is not in good conscience entitled to funds in excess of that which is recovered for medical expenses. The plan thus seeks to impose personal liability on the beneficiary to repay the full amount of benefits, in the form of simple money damages. Awarding these damages gives the plan a measure of recovery

value of defendants' nonexistent gain, but by the value of his own loss—a measure that is traditionally legal, not equitable. Thus, at core, he seeks to obtain a judgment imposing a merely personal liability upon the defendant[s] to pay a sum of money. As *Knudson* explained, historically such claims were viewed essentially as actions at law, and they are therefore unavailable under § 1132(a)(3)." *Id.* (internal quotation marks and citations omitted). *LaRue* is distinguishable from *Knudson* and *Sereboff* because the action is for a breach of fiduciary duty by the plan administrator for failing to comply with the beneficiary's investment instructions. However, as Judge Wilkinson points out, § 1132(a)(3) applies the same limitation regardless of who is suing whom. Sections (a)(1) and (a)(2) provide other remedies for individuals seeking to sue a plan administrator, but the application of section (a)(3) requires in all situations an analysis of whether the relief sought is in fact equitable. This case was vacated and remanded by the Supreme Court which held that section (a)(3) does apply to an individual plan participant of a defined contribution plan.

192. *See* Sereboff v. Mid Atlantic Medical Servs., 547 U.S. 356 (2006); Great West Life Ins. and Annuity Co. v. Knudson, 534 U.S. 204 (2002).

193. *Cf.* Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268, 285 (2006) (recognizing that a judgment awarded a plaintiff in a civil matter for money damages is considered that plaintiff's property).

194. *See Sereboff*, 547 U.S. 356 (2006); Dugan v. Nickla, 763 F. Supp. 981 (N.D. Ill. 1991).

195. *See Ahlborn*, 547 U.S. at 285.

based on the plan's loss, rather than the beneficiary's gain. Thus, the relief is legal.

3. The Effect of the Merger of Courts of Equity and Courts of Law, and the Bottom Line

The line between legal and equitable restitution is fine, but far from bright. In modern times, the inquiry into the nature of the remedy has become increasingly irrelevant because the equitable and legal courts have merged. However, even though the distinction is based in antiquity, Congress intended to force the courts into the analysis because the policies and principles undergirding ERISA seek to further justice, protect the employee, and protect the employer.[196] The equity limitation seeks to do just that. The courts must "distinguish between actions which are based upon promises and actions which are based upon unjust enrichment."[197] Because Congress requires such a distinction, the inquiry into the nature of the remedy is even more important in this case.[198] Thus, the courts should ask, what is equity? Dobbs posits that:

> [o]ne group of ideas associated with the term equity suggests fairness and moral quality. The law of fiduciary and confidential relationships developed by equity Courts and carried on today in many forms, derived from equity's early emphasis on moral

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196. *See* 29 U.S.C.A. §1003.

197. RESTATEMENT (FIRST) OF RESTITUTION §107, cmt. b (1937) (stating that "[i]n many situations the amount of damages for a breach of contract would be the same as the amount to be recovered on the ground of unjust enrichment and in such situations it is immaterial whether the right of the claimant is based upon the breach of contract or upon unjust enrichment . . . . If the suit is for breach of contract the disappointed promisee is entitled to the value of what he was promised. In cases in which he seeks restitution on the ground of unjust enrichment he is entitled to no more than the value of the benefit which he has conferred upon the other party, except where the other party is more at fault than the claimant, in which case the amount of recovery may exceed the value of the benefit conferred. Even where the other party is more at fault, the recovery will not exceed an amount larger than the gain to the one or the loss of the other." (citation omitted)).

198. *Cf.* Mank v. Green, 323 F. Supp. 2d 115, 122-23 (D. Me. 2004) ("The remedy of equitable restitution sought by Plaintiff under section 502(a)(3) is subject to the traditional equitable considerations. The Court of Appeals for the First Circuit previously offered guidance on the weighing of equities in the context of a traditional equitable action for restitution under ERISA's federal common law: '[t]he trial Court should consider whatever factors it may reasonably believe shed light on the fairness of reimbursement, and weigh those factors against the backdrop of general equitable considerations and the guiding principles and purposes of ERISA.'" (citation omitted) (quoting Kwatcher v. Mass. Serv. Employees Pension Fund, 879 F.2d 957, 967 (1st Cir. 1989), *abrogated on other grounds by* Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1 (2004))).

> rectitude . . . . This idea that equity means moral rectitude is frequently coupled with the idea of flexibility. Equity is said to be flexible rather than rigid, its interest is in justice rather than law.[199]

Over the years, several equitable maxims have been propounded that direct the judgments of the courts of equity.[200] Of these maxims, the federal courts have applied very few to these ERISA lien situations.

In order for an equity court to grant equitable relief to the person seeking it, "[h]e who seeks equity must do equity."[201] Since equity is flexible, the court should review the moral and fundamental expectations of all parties and render to each what he is due.[202] If the party seeking equity must also, via equity, pay the other, then he would be required to pay the other before the judge will grant him his request.

The plan is seeking equity from the beneficiary under § 1132(a)(3), but the plan will not be entitled to the full amount that it has paid. Rather, the plan will be required to limit the lien amount to the amount by which the beneficiary is unjustly enriched. On the same note, the beneficiary is required to do equity as well in that it must pay the plan the amount attributed to medical expenses that it received from the tortfeasor.[203]

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199. DOBBS, *supra* note 49, at 63. By stating that equity is interested in justice rather than law, Dobbs implies that the two are inherently contradictory. As discussed below, this Comment will argue that they are not.

200. *See, e.g.*, MCCLINTOCK, *supra* note 119, at 55 ("He who seeks equity must do equity"); *id.* at 59 ("Must come into equity with clean hands"); *id.* at 69 ("The law prevails where equities are equal"); *id.* at 71("Equity aids the vigilant"); *id.* at 76 ("Equity will not suffer a wrong without a remedy").

201. *Id.* at 53. *See also* George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 FORDHAM J. CORP. & FIN. L. 1 n.37 (2007) (stating that "[t]he practical meaning of this maxim is that whatever the nature of the remedy sought, the court will not give equitable relief to one seeking it unless he will admit and provide for all of the equitable rights, claims and demands of his adversary growing out of, or necessarily involved in, the subject matter of the controversy"); Roger Young and Stephen Spitz, *SUEM – Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S. C. L. Rev. 175 (2003); Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 618 (1997) (stating that the maxim is "designed to prevent the unjust enrichment of the plaintiff at the expense of the defendant").

202. McQuiddy v. Ware, 87 U.S. 14, 19 (1873) (stating that the complainant has not observed this equitable maxim that he who seeks equity must do equity. "While admitting his indebtedness, and that it has existed for ten years or more, [the complainant] does not make a tender in court of what is justly due, although he is asking the court to set aside the proceedings by which this indebtedness was satisfied, on the ground of their absolute nullity.")

203. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).

When he who seeks equity also does equity, equity is also said to "aid[] the vigilant."[204] In simple words, justice will render to each his due, and he who is more vigilant is due more. In the situation addressed here, it seems that equity completely fails to aid the vigilant because it strips the beneficiary of his compensation for suing the tortfeasor. For the beneficiary, vigilance requires him or her to seek compensation from the tortfeasor. By the terms of most plans, the beneficiary is not personally responsible to repay the benefits unless the beneficiary sues a tortfeasor and a judgment is received from the tortfeasor. The beneficiary, then, could choose to not seek a judgment against the tortfeasor and subsequently be in a better position than if he or she did seek compensation. In that case, the plan does not recover any of its benefits and is, in fact, in a worse position than it was before the plan sought a legal remedy.

Because the beneficiary is vigilant in seeking compensation from the tortfeasor, he or she should be rewarded for that effort. But if the plan pays $200,000 for medical expenses, and the beneficiary can only recover $500,000 from the tortfeasor, then the disbursement of that judgment will effectively leave the beneficiary with no compensation for pain and suffering, lost wages, permanent loss, and other compensatory damages to which he or she is entitled. One-third of the judgment will first be disbursed to the attorney handling the case, $200,000 will then be disbursed to the plan, and the beneficiary receives approximately $100,000.[205] If the beneficiary's judgment only represents compensation for $35,000 attributable to medical expenses plus compensation for other damages, the plan should have an equitable lien against the judgment for $35,000, not $200,000. Otherwise, the vigilant is punished for seeking compensation for his or her injuries that were paid for by the plan. The plan may very well have subrogation rights where it can pursue the claim itself, but that is not the case here. The plan watches while the beneficiary relives the event, pays the attorney's fees, pays the court costs and then once all of the hard work is done, the plan runs to the courthouse and expects the beneficiary to give it all of the money he or she received for injuries that are unrelated to the plan's contribution. The concepts of unjust enrichment and equity courts' aiding the vigilant are supported by the policy rationale behind ERISA.[206]

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204. MCCLINTOCK, *supra* note 119, at 71.

205. Sometimes the contingency fee percentages will change depending on the type of cases. For example, in medical malpractice cases, the typical percentage is approximately 35-40% because of the excessive nature of the preparatory work.

206. *See supra* notes 37-38 and accompanying text.

Another great maxim of equity is that one must come into equity "with clean hands."[207] This maxim may result in a denial of an equitable remedy on the basis of his "unclean hands" – that is, his misconduct – provided that the misconduct is sufficiently related to his claim. "The unclean hands defense is closely related to other equitable defenses such as unconscionability or unfairness in contracts, and even to equitable concerns over hardship."[208] By seeking legal restitution via couching the claim in an equitable manner, the plan does not come to the court with clean hands. Rather, its hands are dirty with semantics and rationalizations that further blur the distinction between equitable and legal restitution.

IV. THE PRINCIPLE THAT PREVENTS MEDICAID OVER-REIMBURSEMENT SHOULD ALSO APPLY TO ERISA FIDUCIARIES

The distinction between the analysis in Medicaid and ERISA liens is that federal law provides guidelines for third party liability in Medicaid cases, while the legislature is relatively silent in ERISA cases.[209] However, even though the black letter law is different, the solution is not to ignore this recent understanding of Medicaid law. Rather, the rationale and public policy behind such a law ought to be applied to other areas of the law that have a similar effect on beneficiaries. The public policy does not change from Medicaid to ERISA cases in that it is fundamentally unjust for an ERISA plan, Medicaid, or medical care provider to share in damages for which it has provided no compensation.[210] The question then becomes, why is it fundamentally unjust?[211] Because the law says so, or because such a result is naturally reprehensible to the minds of rational people? The principle of justice is not some internal function of man's creation, but rather, it is an

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207. DOBBS, *supra* note 49, at 92.

208. *Id.*

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

210. *Cf. infra* note 225 and accompanying text.

211. *See* Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131 (2004) for a general discussion of why the question is important and what judges should do in response. Judge Weinstein states that "the judge embraces his professional life most fully when he is prepared to fight—and be criticized or reversed--in striving for justice." *Id.* at 131. Weinstein concludes that

> judges must follow the law to avoid a kritarchy—except, it is submitted, when that law requires the violation of the essence of mankind's sense of justice. The incongruity between the law and demands of a core right (call it natural justice if you will) must be absolutely clear if a judge is to rely on this fall-back duty to the heart of fairness. Id. at 132 (footnote omitted.)

external principle upon which all things are based.[212] Such a result is fundamentally unjust because justice is an objective, external measuring stick to determine if each person is punished or rewarded, given to or taken from, in accordance with what they deserve.[213] And in this case, justice is scarce.As opposed to ERISA cases, the Supreme Court followed the principle of justice in *Arkansas Department of Health andHuman Services v. Ahlborn.*[214]

A. Ahlborn *Enforces the Principle that Medicaid Can Seek a Lien Only in the Amount of the Third Party's Liability for Medical Expenses.*

Before a Medicaid recipient can receive the benefits of Medicaid, he or she must apply to the state Department of Medical Assistance Services

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212. *See* Arthur Allan Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979). Leff concludes that there is no extra-systemic principle of justice upon which we can base our laws, but then paradoxically turns around and relies on such a principle to support his entire belief system:

> I want to believe—and so do you—in a complete, transcendent, and immanent set of propositions about right and wrong, *findable* rules that authoritatively and unambiguously direct us how to live righteously. I also want to believe—and so do you—in no such thing, but rather that we are wholly free, not only to choose for ourselves what we ought to do, but to decide for ourselves, individually and as a species, what we ought to be. What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good and to create it.
>
> . . . .
>
> All I can say is this: it looks as if we are all we have. Given what we know about ourselves and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us "good," and worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us, could law be unnatural, and therefore unchallengeable. As things now stand, everything is up for grabs. Nevertheless:
>
> Napalming babies is bad.
>
> Starving the poor is wicked.
>
> Buying and selling each other is depraved.
>
> Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot—and General Custer too—have earned salvation.
>
> Those who acquiesced deserve to be damned.
>
> There is in the world such a thing as evil.
>
> [All together now:] Sez who?
>
> God help us.

Id. at 1229, 1249.

213. *Id.*

214. *See supra* note 27 and accompanying text *infra* Part IV.B.

(DMAS).[215] "As a condition of eligibility," the applicant must "assign the State any rights . . . to payment for medical care from any third party."[216] While the Medicaid recipient "assigns" his or her rights to the state to recover from a third party, subsection H of section 1367a(a)(25) clearly defines and explains the rights the applicant assigns to DMAS: "[T]o the extent that payment has been made under [DMAS] . . . for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party *for such health care items and services. . . .*"[217] The necessary logical conclusion from the foregoing federal provisions is that the Medicaid recipient retains his or her rights to *any* and *all* recovery from a third party, except for those medical services or care paid by DMAS, which was assigned to DMAS upon application. In other words, DMAS only acquires the rights to the portion of a judgment, settlement, or award that is allotted for medical services or care.

When a third party is liable for the injuries of a Medicaid recipient and the state finds that seeking a lien would be economically advantageous (i.e. when the amount of recovery exceeds the cost to recover), "the state will seek reimbursement for such [medical] assistance [provided] to the extent of such legal liability."[218] The Supreme Court interpreted the term "legal liability" to mean a judicially determined responsibility "to pay for care and services available under the plan."[219] In other words, DMAS can only seek the amount of medical expenses for which the third party is liable. For example, if the defendant is only legally liable for $35,000 of the recipient's medical expenses, yet the state has paid $200,000 in medical expenses, the state can seek only compensation for that which the third party is liable, that is, the $35,000.

In the *Ahlborn* case, Justice Stevens contrasted legal liability for medical expenses paid for by the state with the third parties' legal liability for lost wages, pain and suffering, or inheritance, the latter of which is clearly not within the scope of 42 U.S.C. § 1367a(a)25(A).[220] "At the very least, then, the federal third-party liability provisions *require* an assignment of no more than the right to recover that portion of a settlement that represents payment

215. *See, e.g.*, Medicaid in New York State, http://www.health.state.ny.us/health_care/medicaid/#apply (last visited on January 4, 2008).

216. 42 U.S.C. § 1396k(a)(1)(A) (2006).

217. *Id.* § 1396a(a)(25)(H) (emphasis added).

218. *Id.* § 1396a(a)(25)(B) (2006).

219. Arkansas Dept. of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 280 (2006); 42 U.S.C.A. § 1396a(a)(25)(A) (2006).

220. *See Ahlborn*, 547 U.S. at 280, 281.

for medical care."[221] "Again, the statute does not sanction an assignment of rights to payment for anything other than medical expenses – not lost wages, not pain and suffering, not an inheritance."[222] The Supreme Court definitively stated that the provisions that permit DMAS to seek reimbursement are limited to the portion of the judgment, settlement, or award that is dedicated to medical expenses, which is an implied exception to the anti-lien provision.[223] Any other result would be fundamentally unjust.[224]

In *Ahlborn*, the court focused on fairness and, in a footnote, cited with approval an illustrative case from the Washington Supreme Court "explain[ing] that the department could not 'share in damages for which it has provided no compensation' because such a result would be absurd and fundamentally unjust."[225] In *Ahlborn*, the recipient settled for $550,000 and Medicaid paid $215,645.30 in benefits for the beneficiary's medical expenses.[226] The parties stipulated that $35,581.47 of that settlement was attributable to medical expenses.[227] Medicaid sought a lien for the full amount of benefits paid;[228] however, the Supreme Court only allowed Medicaid a lien for the amount apportioned for medical expenses,[229] a result the next section will argue is fundamentally just.

B. Treating ERISA Differently from Medicaid Promotes Legal Positivism.

The Supreme Court of the United States issued the *Ahlborn* opinion on May 1, 2006, and subsequently issued the *Sereboff* opinion on May 15,

221. *Id.* at 282.

222. *Id.* at 281.

223. *Id.* at 284. 42 U.S.C. § 1396p(a)(1) requires in pertinent part that "no lien may be imposed against the property of an individual prior to his death on account of medical assistance paid or to be paid on his behalf under the state plan, except" in situations such as fraudulently received payments or other situations not relevant in *Ahlborn* or here.

224. *See Ahlborn, 547 U.S.* at 288.

225. *Id.* at 288 n.18 (discussing Flanigan v. Dep't of Labor & Indus., 869 P.2d 14 (Wash. 1994)).

226. *Id.* at 274.

227. *Id.* To reach $35,581.47, the parties estimated the total value of the claim (denominator) divided by the total amount of medical expenses (numerator). The applicable rate determined from that fraction was then multiplied to the total settlement amount that allowed the parties to determine what portion of the settlement was attributed to medical expenses. The Court noted that if the risk of the parties "allocate[ing] away the state's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Id.* at 289.

228. *Id.* at 278.

229. *Id.* at 292.

2006.[230] The marked distinction between the two cases begs the question: Why are they different? At first glance, the difference is that Medicaid's anti-lien provision limits the extent of the lien against the beneficiary's judgment, while ERISA simply limits the plan to equitable relief without providing further guidance on the issue.[231] The logical conclusion is that the difference must be in the promulgation of a law. This analysis is a prime example of legal positivism, ignoring the principle of justice.

According to Thomas Aquinas, "[Law] is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[232] Justice is a principle outside of the definition of a law and it is a standard by which laws are validated.[233] It is antithetical to say that a law is just because it is a law, but rather justice must be some extra-systemic source in order to validate a law.[234] However, legal positivism, a theory of law positing that justice is a systemic principle created by the legislature,[235] rejects the notion that law requires several elements in

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230. *See id.*, 547 U.S. 268 (2006); Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356 (2006).

231. *Compare Ahlborn, 547 U.S. 268, with Sereboff, 547 U.S. 356.*

232. THOMAS AQUINAS, SUMMA THEOLOGICA, First Part of the Second Part, Question 90, Article 4 (Fathers of the English Dominican Province, trans., Christian Classics ed. 1981) (2d ed. 1920).

233. *Id.* at Second Part of the Second Part, Question 58, Article 11. "[T]he matter of justice is an external operation, in so far as either it or the thing we use by it is made proportionate to some other person to whom we are related by justice. Now each man's own is that which is due to him according to equality of proportion. Therefore the proper act of justice is nothing else than to render to each one his own."

234. Unfortunately, there is no dictionary definition for the term "extra-systemic." However, it means exactly what it says: the principle of justice is not created or maintained by the system, but rather is a principle created and maintained by those ordinances of reason naturally written on the heart of man by God, through which the system is judged.

235. Bruno Simma and Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 304 (1999) ("Law is regarded as a unified system of rules that, according to most variants, emanate from state will. This system of rules is an 'objective' reality and needs to be distinguished from law 'as it should be.' Classic positivism demands rigorous tests for legal validity. Extralegal arguments, e.g., arguments that have no textual, systemic or historical basis, are deemed irrelevant to legal analysis; there is only hard law, no soft law. For some, the unity of the legal system will provide one correct answer for any legal problem; for others, even if law is 'open-textured,' it still provides determinate guidance for officials and individuals." (citations omitted)); David Dyzenhaus, *The Demise of Legal Positivism?* 119 HARV. L. REV. F. 112 (2006) (stating that because "both the positivistic conception of law as a system of rules and the rival conception of law as a principled order are ultimately rival political conceptions, officials who wish to remain faithful to law will try to make decisions that best advance one of these political ideals.").

order to be properly considered "law."[236] This alternative theory of law is the equivalent of putting the cart before the horse in that a law is just because it is a law, not because it complies with a higher morality.[237] Obviously, this argument is easily recognizable as a circular fallacy.[238] Instead of taking the

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236. Charles E. Rice, *Rights and the Need for Objective Moral Limits*, 3 AVE MARIA L. REV. 259 (2005). Professor Rice describes the theory of legal positivism as follows: "If one cannot really know what justice is, how can one insist that a law must be just as a condition of its validity? All theories of legal positivism share to some degree the denial of the ability of reason to know what is right or wrong. These theories therefore focus on what the law is, not on whether it is just. As [Hans] Kelsen put it, 'Any content whatsoever can be legal; there is no human behavior which could not function as the content of a legal norm.' Thus, the only requirement for a law to be valid and binding is that 'it has been constituted in a particular fashion, born of a definite procedure and a definite rule.' And once a law is enacted, it is obligatory. Since there is no higher law of nature or of God, the positive law cannot be criticized as unjust. Kelsen believed that justice 'is not ascertainable by rational knowledge at all . . . . [Rather], [f]rom the standpoint of rational knowledge there are only interests and conflicts of interests . . . . Justice is an irrational ideal.' Rights for the relativist, therefore, are merely conventional." *Id.* at 268-69 (footnotes omitted).

237. *Id.*; *see also* Brian H. Bix, A DICTIONARY OF LEGAL THEORY 120-21 (2004) ("'Positive law' is law that is created by human officials and institutions . . . . Legal positivism was traditionally contrasted with natural law theory . . . that equated legal validity with not being unjust. By contrast, legal positivism purports to separate the question of whether a norm is 'law' within a particular system . . . from the question of the merits of that norm or that system."); H. L. A. Hart, THE CONCEPT OF LAW 181-82 (1972) ("Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.").

238. Illustrative dialogue between fictitious person A and fictitious person B:

A: "Is this just?"
B: "Yes."
A: "Why?"
B: "Because it is the law."
A: "Why is it the law?"
B: "Because the legislature said it is the law."
A: "What gives them the authority to say what the law is?"
B: "The Constitution, which is the supreme law, the paramount law, the law of all laws."

Legal positivists end the argument there, but for a complete analysis the dialogue should continue as follows:

A: "What gives the Constitution the ability to establish a legislature?
B: "The Declaration of Independence, because it establishes the United States of America as a separate government."
A: "What gives the people the ability to secede and create a separate government?"
B: "The law of nature and of nature's God."

legal positive test, the federal courts should look to equity and should reason that a law is just because it renders to each what he is due.[239]

The necessary question applies to all laws: Is this law just? In other words, does it render to each what he is due?[240] The current status of Medicaid law renders to each what he is due; Medicaid not only renders to the beneficiary what he is due, but also renders to Medicaid what it is due.[241] After *Ahlborn*, the Supreme Court recognized the disparity in justice and essentially concluded that the Medicaid law in Arkansas was fundamentally unjust.[242] But the question remains: Why did the Supreme Court think that Arkansas' statutory scheme was fundamentally unjust? It appears, after the *Sereboff* opinion, that the Court's measure of justice is the law itself, which is systemic.[243] However, the law is not the source of justice; it is the object of it.[244] The Supreme Court argued that the state could not share in the recovery

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239. *See supra* note 233.

240. *See id.*

241. *See supra* notes 225-29 and accompanying text. Essentially, Medicaid only recovers from the beneficiary what the beneficiary recovers from the tortfeasor for medical expenses. The beneficiary retains his or her rights to damages for pain and suffering, lost wages, permanent injury, etc. This is just because it renders to each what he is due. Medicaid is due the medical expenses that the tortfeasor pays, but it is not due the full amount of medical expenses that it paid. Medicaid is not due the full amount of medical expenses that it paid because that amount was not fully recovered by the beneficiary. A contrary result would allow Medicaid to share in a judgment for which it provided no compensation. This analysis is what *Ahlborn* said is absurd and fundamentally unjust. On the other hand, the beneficiary is due the compensatory damages that the tortfeasor pays for everything other than medical expenses. By this analysis, Medicaid seems particularly just while ERISA does not. Furthermore, the difference in a trial result and a settlement is virtually the same. *See* Robert J. Rhee, *Tort Arbitrage*, 60 FLA. L. REV. 125, 163-64 (2008) ("On average, settlements produce better or no worse outcomes than trials. This is particularly so for defendants, who have a greater disparity in the values achieved between trial and settlement. The difference in value constitutes potential surplus. The defendant can manage the dispute resolution process and avoid trial (a most expensive endeavor) by offering an amount from this surplus that is sufficient to incentivize the plaintiff to settle. This explains in large part why settlements are so prominent in tort actions. The tort system is not the 'all-or-nothing proposition that its rules envision and its critics decry,' but it instead provides 'part-recovery-most-of-the-time.' Deductions from compensation are a structural feature of the tort system. The most obvious factor is the American rule of attorney fees." (citation omitted)).

242. *See supra* note 225 and accompanying text.

243. This appears to be the answer because the Supreme Court did not identify any other explanation other than the distinction between the two bodies of law. In fact, the Supreme Court did not even reference *Ahlborn* in *Sereboff*.

244. Martin Luther King, Jr., *Letter From a Birmingham Jail*, *in* 2 CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT 653, 656 (Scott J. Hammond, Kevin

of damages for which it provided no compensation.[245] This is an argument from justice, because the Court is essentially saying that the State is not entitled to that money, or, in other words, it is not due that money. Rather, the beneficiary is due that money.

On the contrary, the current status of ERISA law does not render to each what he is due.[246] The Supreme Court, after passing the justice test in *Ahlborn*, failed remarkably in *Sereboff*.[247] In fact, the Court did not even consider the question of what each party is due. This reveals that in *Sereboff*, the Court viewed justice as based solely on the existence, or lack thereof, of a law promulgated by men. The Court did not ask what amount was attributable to medical expenses. In the *Sereboff* case, as opposed to the *Ahlborn* case, the Court did not say that allowing the plan to share in the recovery for which it provided no compensation was fundamentally unjust. Rather, the Court glossed over the issue and attempted to interpret the specific law without applying equitable principles required of a court of equity.[248] The Supreme Court should, however, reconsider this issue and apply the principle of justice to the analysis, as it did in *Ahlborn*.

V. CONCLUSION

ERISA liens should be limited under the principles of equity to only those amounts for which the third-party tortfeasor is legally liable.[249] Because equity is meant to be flexible,[250] honoring those who do equity,[251] are

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R. Hardwick & Howard J. Lubert eds., 2007). King, quoting St. Augustine, argued that "'an unjust law is no law at all.' "

245. Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 288 n.19 (2006).

246. *See supra* note 233. ERISA allows the plan to share in damages for which it has provided no compensation. In terms of justice, this is exactly what the Supreme Court denounced in *Ahlborn*, 547 U.S. at 288 n.19. In addition, the plan receives what it is due by obtaining those funds earmarked for medical expenses from the settlement or judgment. The plan here is different from Medicaid in that the beneficiaries of Medicaid are indigent and do not pay for their insurance, whereas the beneficiaries of ERISA plans do pay for their insurance for medical expenses. Even though they do not specifically write the check to the insurance company, the employer pays the insurance company what it would otherwise pay the employee. By providing a benefit to the employee, the benefit is compensation for services. Regardless of the form of the compensation, the employee works for that benefit and essentially pays for it. The benefit here is that the plan essentially promises to pay for medical expenses, should some unforeseen event occur that requires the beneficiary to seek medical treatment.

247. *See supra* notes 28-29.

248. *See supra* Part III.

249. *See id.*

250. *See supra* note 199 and accompanying text.

vigilant[252] and come with clean hands,[253] the courts should apply the principles of equity so that the undergirding principles of justice are ultimately achieved.[254] Instead, the courts have misapplied the principles of equity by blurring the distinction between legal and equitable relief.[255] While Congress has determined, systemically, how ERISA will work, Congress cannot alter the extra-systemic principle of justice, which informs equity. In sum, Congress requires that the relief sought be equitable, and equity requires that, for a plan to recover against a beneficiary, the plan must be (1) in good faith entitled (2) to a specific object (3) in the possession (4) of the defendant.[256]

Furthermore, the outcome in Medicaid lien situations should be the same in ERISA lien situations; indeed, the statutory requirements of both compel such a result.[257] Instead of basing the federal common law on the presence, or lack thereof, of a promulgated law, the Supreme Court should base its rulings on, or at minimum ensure consistency with, the fundamental principle of justice.[258] Because the factual situation in ERISA and Medicaid cases are virtually identical,[259] the principles set forth in *Ahlborn* should inform the conclusion in ERISA cases, regardless of the statutory variations.[260] If the result under Arkansas law was absurd and fundamentally unjust, then the same result is likewise absurd and fundamentally unjust under ERISA.[261]

The result in ERISA and Medicaid cases can be just if the Supreme Court strictly applies the statutory requirements for both. Without requiring certain *Knudson* prerequisites for recovery in ERISA cases, the Supreme Court essentially creates an atmosphere in which injustice can flourish. Instead, the Court should require that the plan be, in good conscience, entitled to the specific asset it designates, creating an atmosphere where justice can flourish.

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251. *See supra* note 201 and accompanying text.
252. *See supra* note 204 and accompanying text.
253. *See supra* note 207 and accompanying text.
254. *See supra* notes 211-13 and accompanying text.
255. *See supra* Part III.
256. *See supra* notes 89-94 and accompanying text. These elements are nothing more than the elements of equitable liens as they apply to ERISA.
257. *See supra* Part IV.
258. *See supra* notes 209-13 and accompanying text.
259. *See supra* note 22 and accompanying text.
260. *See supra* notes 230-39 and accompanying text.
261. *See supra* notes 209-13 and accompanying text.