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COMMENT

THE ERISA REMEDIES LOOPHOLE: HOW THE PREEMPTION AND REMEDIES PROVISIONS ALLOW TORTFEASORS TO AVOID LIABILITY*

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I. INTRODUCTION

On August 10, 1978, four years after the enactment of ERISA, President Carter called the statute "a symbol of unnecessarily complex government regulation."[1] Almost twenty-five years later, American courts are still struggling to interpret and administer the labyrinth of ERISA provisions. One of the most nebulous areas of the statute relates to the question of what state law actions are preempted by ERISA.[2] The health care community is concerned with the preemption effects on medical malpractice claims; the business community is concerned with the preemption effects on claims arising out of alleged mismanagement of benefit plan funds.

At common law, a tort claim could remedy a situation in which an employer economically damaged an employee through either fraud or mismanagement of an employee benefit plan.[3] However, now the sweeping language of the ERISA preemption clause makes it impossible to pursue such claims.[4] Instead, any claims that "relate to" a covered benefit plan must be brought as an ERISA action.[5] In addition the available remedies are only those authorized by the statute, instead of the expansive tort law remedies.[6]

The crucial question is, which claims against a benefit plan administrator are preempted? Unfortunately, the courts have not offered much guidance on this question, but some general rules can be gleaned from the federal case law. It is important for any business that maintains a covered plan to be aware of possible claims arising from the fiduciary relationship. Businesses that maintain such plans need not only to know how to protect against litigation, but also how to maintain good relationships with their employee-beneficiaries. Generally speaking, preemption by ERISA is a good thing for a business, since the remedies provided by ERISA do not create a bet-the-

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1. Message of the President to the Congress of the United States, August 10, 1978. *See* 29 U.S.C. § 1001 (2000).

2. 29 U.S.C. § 1144(a) (2000).

3. Most common law fraud claims can be proven by showing a knowing and intentional misrepresentation upon which a claimant relied to his detriment. *See, e.g.*, TIG Ins. Co. v. Sedgwick James of Washington, 276 F.3d 754, 762 (5th Cir. 2002) (example of elements of Texas common law fraud).

4. *See generally* 29 U.S.C. § 1144.

5. *Id.* § 1144(a).

6. *See generally id.* § 1109 (2000).

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company type scenario that often arises under a tort claim.[7] However, employees who are restricted by this statute argue that the ERISA remedies do not compensate them, but rather serve only as administrative regulation to dissuade businesses from fraudulent conduct, and therefore their tort claim should not be preempted.[8] This comment will explore ERISA preemption from both perspectives.

Once a common law claim is preempted by ERISA, the next step is to determine liability under the statute, and then what remedies, if any, are available to the claimant. If a plaintiff is forced to sue under ERISA because his claim is preempted, then the remedies available to him are dramatically reduced.[9] From a business perspective, the ERISA remedies scheme is a double-edged sword. On one hand, it protects the business that is administering the benefits plan from a deluge of litigation and liability. Fighting tort claims, which may be filed in business-unfriendly jurisdictions, takes a great amount of resources, and the outcome of such tort cases is much less predictable. By limiting remedies to those provided in ERISA, Congress has provided a bit more stability to businesses that administer benefit plans. On the other hand, employees who may be harmed by the administration of benefit plans may be left without a remedy in some instances. This situation may cause employees to feel as if they are not being protected and lose faith in their employers, creating a work environment that can be detrimental to the business. This comment will also explore recent cases in which plan beneficiaries are damaged by employers' violations of ERISA, but have no remedy under the statute or at common law. It will examine the unfortunate effect that the interaction of the ERISA preemption provision and the remedies provision can have on a claimant seeking an ERISA remedy.

II. BACKGROUND

Perhaps already foreseeing the administrative and interpretative nightmare that ERISA would become, Senator Javits noted Congress's intent that "a body of Federal Substantive law will be developed by the courts to deal with

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7. For instance, many states allow awards of punitive damages for a common law fraud claim. In BMW, Inc. of North America v. Gore, the Supreme Court recognized that such damages can be proper for fraud. 517 U.S. 559, 588 (1996).

8. *See, e.g.*, Griggs v. E.I. DuPont De Nemours & Co., 237 F.3d 371, 373-74 (4th Cir. 2001).

9. *See* supra note 6 and accompanying text.

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issues involving rights and obligations under private welfare and pension plans."[10] Although this statement may be but a truism,[11] courts have recognized their charge and developed such a body of law.[12]

A. *The Protective Purpose of ERISA*

ERISA[13] was enacted in 1974 using federal commerce clause power.[14] A primary purpose of the statute was for the protection of employees.[15] Congress concluded that "the continued well being and security of millions of employees and their dependants are directly affected by these [employee benefit] plans."[16] Congress also found that "it is desirable to [enact ERISA] to increase the likelihood of protecting plan participants against benefit losses."[17] One of the explicit policies of ERISA was to "provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans."[18] Fund mismanagement and damage to those enrolled was one of the main reasons for enacting ERISA.[19] In fact, the government speculated that "the current . . . system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfounded pension liabilities onto the termination insurance system and other premium payers."[20]

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10. Employee Retirement Security Act of 1974, Pub. L. No. 93-406, § 4002, 88 Stat. 829, 1004-6.

11. Since it is the role of the courts to develop such a body of common law with regard to the interpretation of any statute, this statement may be superfluous. However, it does serve to show that Congress intended to rely very heavily upon the courts for clarification of ERISA provisions.

12. *See, e.g.*, Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980)(citing Senator Jarvis' remarks).

13. 29 U.S.C. § 1001 (2000).

14. *See id.* § 1001(a) (congressional finding that "multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest"); *id.* § 1003(a) (2000) (stating that ERISA covers "any employee benefit plan if it is established or maintained – (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) by an employee organization or organizations representing employees engaged in commerce or in any industry affecting commerce. . .").

15. *See id.* §§ 1001-1001b; H.R. 93-533, 93d Cong. (1973) ("[t]he primary purpose of this bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans.").

16. 29 U.S.C. § 1001(a).

17. *Id.* § 1001a(b)(1) (2000).

18. *Id.* § 1001a(c)(3).

19. *See Id.* § 1001b(a)(1), (2) (2000).

20. *Id.* § 1001b(a)(4).

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In 1974, the House noted that there were already three federal statutes that in some way related to employment benefit plans, but that they did not offer adequate protection.[21] The First of these statutes was the Pension Plan Disclosure Act of 1958.[22] The Pension Plan Disclosure Act required that employers, upon request, disclose plan information to its participants.[23] However, the House noted that the law was "weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards."[24]

The second statute in place prior to the enactment of ERISA was the Labor Management Relations Act.[25] This statute, however, was not intended to provide protections to plan participants, but rather to "provide the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union."[26]

The third law that indirectly regulated employee benefit plans was the Internal Revenue Code (I.R.C.).[27] However, the I.R.C. merely provided rules under which a plan could gain "qualified status" so as to be tax-exempt.[28] This was not a positive regulation in that employers were not required to fashion their plans to fit within the code, but it did provide some incentive to comply in the form of tax breaks.[29] The House decided that neither the Pension Plan Disclosure Act, the Labor Management Relations Act, nor the Internal Revenue Code provided adequate protection for plan beneficiaries.[30]

Protection of plan members was a fundamental concern of

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21. H.R. REP NO. 93-533, at 4642-43.

22. Welfare and Pension Plans Disclosure Act, Pub L. No. 85-836, 72 Stat. 997 (1958).

23. H.R. REP. NO. 93-533, at 4642.

24. *Id.*

25. 29 U.S.C. §§ 171-180, 182-183 (2000).

26. H.R. REP. NO. 93-533, at 4642.

27. I.R.C. § 401(a) (2000).

28. *Id.* § 401(a)(1)-(4). To qualify for tax exempt status, "the plan must be (1) for the exclusive benefit of the participants, (2) for the purpose of distributing the corpus or income to the participants, (3) established in such a manner to make it impossible for the employer to use or divert funds before satisfying the plan's liabilities; and (4) not discriminate in favor of officers, stockholders, or highly-compensated or supervisory employees." H.R. REP. NO. 93-533, at 4642.

29. *See* H.R. REP. NO. 93-533, at 4642.

30. The House noted that the three laws in place do not protect employees under a benefit plan because "[i]n almost every instance, participants loose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed. . ." *Id.* at 4643.

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the Congress at the time of ERISA's enactment.[31] The United States Supreme Court directs consideration of the employee protection purpose of the statute when deciding issues.[32] In 1984 the Court noted that,

> Among the principal purposes of this comprehensive and reticulated statute was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. . .Congress wanted to guarantee that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.[33]

The Second Circuit noted the protective policy in interpreting the intent of Congress to ensure the honest administration of covered benefit plans.[34]

Despite the purpose clearly established by Congress and reinforced by the courts, the structure of the ERISA preemption provision,[35] coupled with the exclusive remedies provision[36] has often led to situations in which the employee has arguably been harmed more than helped by this statute.

1. The Preemption Clause:

Section 1144(a) of ERISA states that

> except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.[37]

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31. *See* Marshall v. Snyder, 430 F. Supp. 1224, 1231 (E.D.N.Y. 1977).

32. Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 720 (1984).

33. *Id.* (internal quotations omitted).

34. Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d. 911, 914 (2d Cir. 1982) (citing H.R. REP. NO. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5038-5165).

35. 29 U.S.C. § 1144(a) (2000).

36. *Id.* § 1009(a) (2000).

37. *Id.* § 1144(a).

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The term "state law" as used in this section "includes all laws, decisions, rules, regulations or other State actions having the effect of law, of any State."[38] Although State causes of action are not specifically included within this definition, the courts have held them to be a subsection of the list of included State laws.[39] This applies to State causes of action, even if they were not designed with ERISA or even benefit plans in mind.[40] Therefore any state law creating a cause of action is preempted when used to litigate a claim when that claim "relates to" an ERISA covered benefit plan.[41]

The Supreme Court has interpreted the term "relates to" very broadly.[42] In *Ingersoll-Rand Co. v. McClendon* the Court focused on the legislative intent of ERISA, and concluded that the "relates to" language was purposefully grammatically structured to be broad and that the Court should therefore interpret the language broadly.[43] The broad definition of state law in section 1144(c)(1) bolsters the Court's interpretation here.[44] A state law relates to a covered benefit plan when it "(1) has a connection with or (2) reference to such a plan."[45] These two formulations are equally as broad and vague as the language in the statute itself and really offer little guidance.

2. The Remedies Clause:

Section 1009(a) of ERISA states:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made

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38. *Id.* § 1144(c)(1).

39. Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1293-94 (5th Cir. 1989) (holding that state law breach of contract claim as a cause of action is a "State law" within the meaning of the ERISA definitions).

40. Buckley v. Arcadain Corp., 790 F. Supp. 643, 645 (M.D. La. 1992) (order granting motion for summary judgment).

41. 29 U.S.C. § 1144(a),(c)(1).

42. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137-40 (1990).

43. *Id.* at 138-39.

44. *Id.*

45. California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 324 (1997).

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> through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.[46]

In essence, if a business that regulates such a benefits plan breaches a duty, then a plaintiff may recover damages under this section rather than utilizing a tort law cause of action.[47]

The standard of care that is required for a plan administrator is ordinary care—the plan must be managed "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use."[48] But the administrator must be acting "solely in the interest of the participants and beneficiaries."[49] In order to recover, then, a plaintiff must show that the administrator did not even use ordinary prudent care in managing the funds.[50]

Although the language of this provision does not expressly state that the ERISA remedy is an exclusive one, the courts have taken this interpretation.[51] The Supreme Court looked at the remedies provision and the civil enforcement provision[52] of ERISA to conclude that when a cause of action relates to a covered benefit plan, the ERISA remedies are the exclusive means of compensation.[53] The civil enforcement provision, as it relates to an employee-beneficiary, allows for a cause of action to "recover benefits due. . .under the terms of [the] plan, to enforce. . .rights under the terms of the plan, or to clarify. . .rights to future benefits."[54] Looking to the statutory recovery scheme as a whole, the Court concluded that since Congress set forth such a comprehensive and detailed structure for recovery, that it intended that structure to be the exclusive means of recovery in cases where ERISA applies.[55] The Congressional Conference Report further clarifies the legislative

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46. 29 U.S.C. § 1009(a) (2000).
47. *Id.*
48. *Id.* § 1104(a)(1)(B) (2000).
49. *Id.* § 1104(a)(1).
50. *See supra* note 48 and accompanying text.
51. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987).
52. 29 U.S.C. § 1132(a) (2000).
53. *Pilot Life Ins. Co.*, 481 U.S. at 54.
54. 29 U.S.C. § 1132(a)(1)(B).
55. *Pilot Life Ins. Co.*, 481 U.S. at 54.

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intent that the ERISA remedy be exclusive:

> Under the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility. . . .[W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.[56]

And so, by act of the judiciary, the ERISA remedies clause now provides the only means by which a plaintiff may seek to recover for mismanagement or fraud of a covered benefits plan.

The question, then, is whether the relief available under ERISA is appropriate and sufficient. At first glance, it seems that a plaintiff may recover what amounts to compensatory damages under Section 1109.[57] However the provision states that the plan administrator who breaches must "make good *to such plan*" the losses incurred because of the breach.[58] Restoring losses to the benefits plan will surely compensate those employees who are still in the plan and who will draw on those restored funds in the future, but such a remedy does nothing for an employee who is no longer a part of the plan and who nevertheless is disallowed a common law cause of action because of the preemption and exclusive remedies clause.[59]

In addition, a cursory review of the language of Section 1109 might lead one to believe that a punitive damage award is available.[60] The provision allows for "equitable relief as the court may deem appropriate."[61] The courts, however, do not deem

56. H.R. CONF. REP. NO. 93-1280, at 327 (1974).
57. *See* 29 U.S.C. § 1109(a) (2000).
58. *Id.* (emphasis added).
59. *See* discussion *infra* Sec. III; *see also* App. A., tbl. 1.
60. 29 U.S.C. § 1109(a).
61. *Id.*

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punitive damages to be appropriate.[62]

The ERISA statutory scheme apologists may reasonably argue that the system is just in that it seeks to protect the group of beneficiaries. By making those who breach their duties liable to the plan, the plan is made whole and the group is compensated. Furthermore, allowance of punitive damages will only serve to deplete the funds of other beneficiaries, as the fear of such large damages will effectually provide a disincentive for employers to offer a benefits option to employees. The dissenters may argue that the broad way in which the statute is interpreted leaves too many potential plaintiffs[63] without any remedy. An inspection of the cases in the area can be used to make both sides of the argument.

III. ANALYSIS

A. *ERISA preemption as it relates to common law actions against plan administrators*

1. The Varity Opinion:

Varity Corporation underwent a massive restructuring of its employee benefit plan, which gave rise to an ERISA claim for what would have otherwise been a common law fraud claim.[64] The employees argued that Varity had deliberately deceived them when it assured them their benefits would be secure in a massive transfer and asked them to voluntarily do so.[65] The company in which the proceeds were invested, Massey Combines, sustained huge losses and eventually ended up in receivership.[66] The plaintiffs sought equitable relief in the form of a restoration of their membership in the old plan, a remedy which seems to place the parties in the same position as if they had never been induced to move their funds in the first place.[67]

The Court faced three questions in this case: (1) whether the business was an ERISA fiduciary with regard to its actions in persuading the voluntary transfers, (2) did the business breach the ERISA standard of care by its actions, and (3) what relief is

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62. *See, e.g.*, Concha v. London, 62 F.3d 1493, 1504 (9th Cir. 1995).

63. Specifically, those who no longer have rights to benefits under the plan.

64. Varity Corp. v. Howe, 516 U.S. 489 (1996).

65. *Id.* at 494.

66. *Id.*

67. Transcript of Oral Argument, Varity Corp. v. Howe, 516 U.S. 489 (1996) (No. 94-1471), [hereinafter Oral Argument], *available at* 1995 WL 671565 at 28 (Nov. 1, 1995).

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available to these plan participants?[68] The Court found that ERISA was controlling, that Varity did breach its duties, and that the equitable relief feature in Section 1109 did allow the courts to fashion a remedy to plan participants themselves, rather than just to the plan.[69]

First the court noted that a fiduciary under ERISA is one who "'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan."[70] The District Court found, and the Supreme Court agreed, that when Varity persuaded its employees to move their plan funds, it was not only acting as the employer but also as a plan administrator.[71] Since Varity had this type of control over the administration of the plan, then it was a fiduciary under ERISA.[72]

Second, the Court held that Varity's assurances to its employees did violate the prudent man rule.[73] The Court noted that "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries [under ERISA]."[74] This lying occurred as part of Varity's movement to induce its employees to move their funds, a project which was ironically called "Project Sunshine."[75] Varity had given a presentation and literature to its employees when attempting to make the fund transfers, including written material stating "[t]here will be no change in pension benefits as a result of your transfer to Massey Combines Corporation."[76] To exacerbate matters, employees were given a letter stating "[t]o enable us to accept you as an employee of Massey Combines Corporation and continue to process the payment of benefits to

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68. *Varity Corp.*, 516 U.S. at 492.

69. *Id.* at 492.

70. *Id.* at 498 (interpreting ERISA § 3(21)(A)).

71. *Id.*

72. *Id.* at 502-03. Interestingly, the *Varity* definition of a fiduciary might have opened the door to ERISA litigation in cases where common law fraud would be difficult to prove. A United States District Court Judge recently allowed an ERISA claim that sounds much more like a securities claim to go forward under the *Varity* definition. *See* Thomas B. Scheffey, *ERISA—A New Securities Weapon*, THE CONN. L. TRIB., Vol. 28, No. 41 (Oct. 14, 2002). What is not clear is whether this ruling means that a securities action could be preempted by ERISA.

73. *Varity Corp.*, 516 U.S. at 506-07.

74. *Id.* at 506 (quoting Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983)).

75. *See* Respondent's Brief at 3, Varity Corp. v. Howe, 516 U.S.489 (1996), *available at* 1995 WL 449248.

76. *Varity Corp.*, 516 U.S. at 500.

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you, we require that you complete the information below. . ."[77] These statements can easily be construed by an employee as offering no choice in the matter, which is no doubt why the Court found that Varity had failed to meet the prudent man standard and was not acting solely in the interest of the plan participants.[78]

Third, the Court finally allowed some creative room to fashion an equitable remedy for the wronged individuals themselves.[79] Varity argued that any remedy to an individual is not "appropriate equitable relief" under ERISA, since the law sought to protect the entire plan.[80] Varity relied on the Supreme Court's holding in *Massachusetts Mutual Life Insurance Company v. Russell*,[81] which stated ERISA did not authorize individual punitive or compensatory damages.[82] Distinguishing the present case from *Russell* because in *Russell* another ERISA section provided for relief for that plaintiff, the Court held that in this case, where there is no other given remedy, some equitable individual relief is indeed appropriate.[83] In oral argument, the *Varity* plaintiffs argued that the *Russell* plaintiffs did not prevail because they were pursuing specific punitive and compensatory damages under the ERISA section that outlines available remedies to the benefits plan.[84] When seeking statutory relief, there is no place for equitable relief, as the doctrine of equity may only be invoked when there is no adequate remedy at law.[85] The *Varity* plaintiffs, however, were not seeking statutory relief as such.[86] Indeed they conceded that no such remedy was available and that is exactly why the equitable doctrine could be invoked in this case.[87] The Supreme Court agreed.[88]

The Court also noted that ERISA does not just cover administrative actions of the whole plan, but also those actions relating only to certain individuals.[89] Administrators who decide when and how to dole out benefits to certain employees fall

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77. *Id.* at 501.
78. *Id.* at 506.
79. *See generally id.*
80. *Id.* at 509.
81. 473 U.S. 134 (1985).
82. *Varity Corp.*, 516 U.S. at 509.
83. *Id.* at 510.
84. Oral Argument, *supra* note 67, at 32-33.
85. *See, e.g.*, Stern v. South Chester Tube Co., 390 U.S. 606, 609 (1968).
86. Oral Argument, *supra* note 67.
87. *Id.*
88. *Varity Corp.*, 516 U.S. at 515.
89. *Id.* at 511.

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within the definition of a fiduciary and are subject to ERISA.[90] Since the statute contemplates plan managers' actions towards individual employees, in cases where there is no remedy provided for a certain individual, one may be fashioned under the "appropriate equitable relief" provision.[91] The equitable relief upheld in *Varity* was a reinstatement of the employees in their original benefits plan, as if they had never moved their funds in the first place.[92]

Varity illustrates good points for both of the competing arguments about ERISA preemption and remedies. It presents a very unfortunate circumstance in which the named plaintiffs could not recover if indeed the only remedies allowed were those that would compensate the plan itself, since the employees were no longer plan members.[93] Such a situation compels even the most hard-hearted jurist to seek a means by which these plaintiffs can be made whole.[94] Reliance on the equitable relief clause and the policy purpose of protection of beneficiaries is a reasonable solution.[95]

However, the argument remains just as strong on the other side. What the Court failed to take note of in *Varity* is the simple fact that they were merely redistributing the same small pool of funds that was left over after the Varity Corporation's poor investment.[96] When the employees who moved their funds left the original benefits pool, their money went with them, and the overall sum of funds in the pool must be thereby reduced. This would not have been a problem for the remaining members, because their individual proportion would remain the same. Once the Court ordered that the members of the break-away fund be allowed back into the original, they did not have the funds to bring back to the original pool.[97] Since there would now be more

90. *See* 29 C.F.R. § 2509.75-8 (2003).

91. *Varity Corp.*, 516 U.S. at 515.

92. *Id.* at 492.

93. *Id.* at 516.

94. *See* Petitioner's Brief at 27, Varity Corp. v. Howe, 516 U.S.489 (1996), *available at* 1995 WL 375807. Varity noted in its brief that the court below was concerned that if it did not allow individual relief it would "leave unredressed an egregious wrong." *Id.*

95. *Id.*; 29 U.S.C. § 1109(a) (2000); and 29 U.S.C. §§ 1001-1001b (2000).

96. *See generally Varity Corp.*, 516 U.S. 489, 492 (allowing remedy in which named plaintiffs become members of the original benefits plan that they had originally opted out of).

97. *See generally id.* In reaching the conclusion that individual relief was appropriate, the Court first decided that the remedy to the plan was not available to these plaintiffs. Therefore Varity was not liable to restore any funds to the new plan. *Id.* at 515.

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beneficiaries for the same amount of funds in the original pool, the effect is that the employees who did not move their funds in the first place would now have less money to draw upon; they are in effect subsidizing the plaintiffs in this case. The remedy the Court fashioned, then, is a judgment against the entire class of beneficiaries in the fund. And so by focusing on protection of the individual, the Court has thwarted the other legislative intent of protection of the fund, or more aptly, the group as a whole.[98]

2. Losing the ERISA Preemption Battle: *Farr v. U.S. West Communications*

Since the "relates to" language had been so broadly applied, a plaintiff seeking to bring a common law tort claim in lieu of an ERISA action is advised to try other means of getting around ERISA. The statute itself provides a tantalizing loophole in this respect.[99] Section 1003(b)(5) excludes "excess benefit plans" that would otherwise be covered under ERISA from being subject to exclusive federal jurisdiction in an ERISA action.[100] To qualify under this section, the plan must be "maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by [section 415 of the IRC]."[101] If the Secretary of Labor decides that a part of such a plan is separable and maintained for the purpose set out in Section 1002, the plan will be treated as an excess benefit plan.[102] Although this narrow category of plans will not fit every plaintiff's facts, this section has been successfully (albeit infrequently) used to avoid ERISA preemption.[103]

In 1992, Donald J. Farr and other former employees of U.S. West, Incorporated filed suit against their former employer claiming both an ERISA breach and common law claims of breach of contract and fiduciary duties, fraud, and negligent

98. *See* 29 U.S.C. §§ 1001-1001b (findings and policies); *id.* § 1109 (focus on benefiting the plan or group as a whole). The *Varity* plaintiffs pointed out that "[t]he purpose of ERISA is to 'promote the interests of participants and their beneficiaries in employment benefit plans.'" Respondent's Brief at 16, Varity Corp. v. Howe, 516 U.S.489 (1996) (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989)). Neither the *Varity* plaintiffs nor the *Firestone* Court notes the tension between protecting an individual beneficiaries and protecting beneficiaries as a class, and it is unclear who prevails in a conflict. *See generally Varity Corp.* 516 U.S. 489 and *Firestone*, 489 U.S. 101.

99. *See* 29 U.S.C. § 1002(36) (2000); *id.* § 1003(b)(5) (2000).

100. 29 U.S.C. § 1003(b)(5).

101. *Id.* § 1002(36) (2000).

102. *Id.*

103. *See, e.g.*, Petkus v. Chicago Rawhide Mfg. Co., 763 F. Supp. 357, 368 (N.D. Ill. 1991).

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misrepresentation.[104] Although the plaintiffs recognized that their claims clearly "related to" a covered benefits plan, they sought to maintain the tort actions under section 1003(b)(5), by claiming that the plan in question was an "excess benefit plan."[105] Their theory of the case depended on a "5 + 5 Amendment" to the plan, the very amendment that caused their alleged injuries.[106] The 5 + 5 program was designed to encourage early retirement by allowing beneficiaries to add five years to their age and five years to their period of service when determining the amount of plan benefits.[107] The program also allowed for beneficiaries to receive their compensation in one lump sum.[108] Farr alleged that they were not informed of the negative tax consequences of opting for the lump sum payments.[109]

District Judge Marsh recognized that there were three facts in evidence to support classifying the 5 + 5 Amendment as an excess benefit plan: (1) that the funds from this portion of the plan were paid by the employer itself, rather than by the trust, (2) that those payments were in excess of those allowed by IRC § 415,[110] and, (3) that a different discount rate was used for this small portion of the plan.[111] The Court decided, however, that when looking at the overall plan, the 5 + 5 Amendment was "simply a part of the Pension Plan."[112] Judge Marsh relied partially on the fact that there was a single plan document that was administered by one committee; but his conclusion was buttressed by an analysis of Congressional intent.[113] He argued that reliance on I.R.C. § 415 was not enough to exempt a portion of a plan from ERISA preemption because "for purposes other than tax law, a qualified plan and a plan providing additional benefits may be treated as one plan by the employer."[114] Even though a portion of the plan might have been motivated by the

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104. Farr v. U.S. West, Inc., 815 F. Supp 1360, 1361 (D. Or. 1992).

105. *Id.* at 1362.

106. *Id.* at 1361-62.

107. *Id.* at 1361.

108. *Id.*

109. *Id.* at 1361-62. Although this comment will not examine the individual merits of the case it is of note that U.S. West did send its employees literature regarding the tax consequences of the plan amendment, which stated in part "[t]he tax consequences . . . are complex . . . you should consult with your tax advisor." *Farr*, 815 F. Supp. at 1366.

110. This finding tracks the language of the statutory definition of "excess benefit plan." 29 U.S.C. § 1002(36) (2002).

111. *Farr*, 815 F. Supp. at 1363.

112. *Id.*

113. *Id.*

114. H.R. CONF. REP. NO. 93-1280, at 346-47 (1974).

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Internal Revenue Code, if the employer treats it as part of a single plan, ERISA continues to preempt it in its entirety.[115]

Taking a surprising turn, a three-Judge panel of the Ninth Circuit reversed the decision that the tort claims were preempted.[116] Instead of disturbing the District Court's finding that the 5 + 5 program was not an excess benefit plan, the panel held that the claims did not even relate to the benefits plan and therefore the exception was not necessary.[117] The Court noted four general categories of state law that it had previously held "relate to" benefits plans.[118] Of these categories, "laws that provide remedies for misconduct growing out of the administration of ERISA plans," seemed the most likely candidate to preempt the plaintiffs' claims.[119] The panel, however, found that the claim of misrepresenting tax consequences was not a product of the administration of the plan, but rather a separate activity.[120] This finding paved the way for plaintiffs to litigate their tort law claims on remand.

Apparently unmoved, District Judge Marsh declined to follow the road the Ninth Circuit had paved, again finding that the state law claims were preempted.[121] This time the appeals court, relying on the *Varity* definition of "plan administration,"[122] decided that the plaintiffs' misrepresentation claims did indeed relate to an ERISA covered plan.[123] The Court found that "the ERISA fiduciary duty includes the common law duty of loyalty" and therefore the misrepresentation claims did fall under those activities covered under the term "plan administration."[124]

Although this decision left the *Varity* standard for relating to a benefits plan untouched, the more interesting question is what remains of the "excess benefit plan" exception. The appeals court never addressed this question, although it had two opportunities to do so. The District Court had taken a very narrow stance on applying the exception, and without contrary guidance from the appeals court, it would presumably do so again.

115. *Farr*, 815 F. Supp. at 1363.

116. Farr v. U.S. West, Inc., 58 F.3d 1361 (9th Cir. 1995).

117. *Id.* at 1366-67.

118. *Id.* at 1365.

119. *Id.*

120. *Id.*

121. Farr v. U.S. West Communications, Inc., 151 F.3d 908, 911 (9th Cir. 1998).

122. Note that the *Varity* decision was handed down after the Circuit had made its initial determination that the *Farr* plaintiffs' claim was not preempted. *Varity*, 51 U.S. 489.

123. *Farr*, 151 F.3d at 913.

124. *Id.* at 915.

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B. *ERISA remedies once a common law action has been preempted*

Since the *Varity* opinion, a few of the federal circuits have undertaken the question of whether reinstatement of an employee to a benefit plan is an appropriate remedy under ERISA. This section will examine the different approaches taken by the Ninth, Fourth, and First Circuits in answering this question.

1. Background: The Supreme Court limits the availability of individual compensatory and punitive damages and other equitable relief

The Supreme Court has long recognized that ERISA does not allow individual relief in the form of money damages.[125] If a plaintiff cannot be made whole by seeking restitution to the benefits plan itself, he must ask for an individual equitable remedy under ERISA § 502(a)(3). Despite the broad powers that courts generally have in fashioning equitable relief, the Supreme Court has held that equitable relief as it applies to ERISA is much more limited.[126] In *Mertens*, the Court declined to allow

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125. Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993).

126. *Id.* Justice Scalia, relying heavily on a semantic argument to construe the ERISA remedies clause stated:

> Petitioners maintain that the object of their suit is "appropriate *equitable* relief" under § 502(a)(3) (emphasis added). They do not, however, seek a remedy traditionally viewed as "equitable," such as injunction or restitution. . . . In the context of the present statute, we think there can be no doubt. Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all.* We will not read the statute to render the modifier superfluous. See *United States v. Nordic Village, Inc.,* 503 U.S. 30, 36, 112 S.Ct. 1011, 1015-1016, 117 L.Ed.2d 181 (1992); *Moskal v. United States,* 498 U.S. 103, 109-110, 111 S.Ct. 461, 465-466, 112 L.Ed.2d 449 (1990). Regarding "equitable" relief in § 502(a)(3) to mean "all relief available for breach of trust at common law" would also require us either to give the term a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between "equitable" and "remedial" relief in § 409(a), and between "equitable" and "legal" relief in the very same section of ERISA, *see* 29 U.S.C. § 1132(g)(2)(E); in the same subchapter of ERISA, *see* § 1024(a)(5)(C); and in the ERISA subchapter dealing with the PBGC, *see* §§ 1303(e)(1), 1451(a)(1). Neither option is acceptable. See *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 479, 112 S.Ct. 2589, 2596, 120 L.Ed.2d 379 (1992); *cf. Lorillard v. Pons,* 434 U.S. 575, 583, 98 S.Ct. 866, 871, 55 L.Ed.2d 40 (1978). The authority of courts to develop a "federal common law"

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equitable relief under ERISA to plaintiffs who sued a non-fiduciary, while recognizing that typically in the law of trusts, such an equitable remedy would be available.[127] The Court placed a limitation on what constitutes "appropriate equitable relief," but did not give any guidance as to what might actually constitute equitable relief.[128]

The Supreme Court seemed to open a door for a claim in restitution, as "other appropriate equitable relief" in 2000.[129] However, two years later, the Court all but slammed this door shut, as it drew a "fine distinction" between restitution at law and restitution in equity, holding that a restitution claim under a contract sought restitution at law and therefore was not seeking an equitable remedy of the type allowed by ERISA.[130] The one equitable remedy that seems to have worked more often than others is a reinstatement into a benefits plan after a beneficiary has left it.[131] The effectiveness of this remedy is explored below.

2. *Farr* revisited: The Ninth Circuit view that reinstatement is not an appropriate equitable remedy

Having decided that the *Farr* claims must be brought under ERISA instead of as common law tort actions,[132] the Ninth Circuit went on to determine what relief is available.[133] The Court held that the defendants had indeed breached their fiduciary duty to the *Farr* plaintiffs.[134] However, the Court also held that there simply was no remedy available to the plaintiffs for the damage caused by this breach.[135]

The Plaintiffs had sought relief in the form of compensatory

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under ERISA, *see Firestone,* 489 U.S. at 110, 109 S.Ct. at 954, is not the authority to revise the text of the statute. *Id.* at 255-59.

127. *Id.* at 267.

128. *See generally id.*

129. *See* Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 241 (2000) ("An action for restitution against a transferee of tainted plan assets" is "appropriate equitable relief [under ERISA].").

130. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213-215 (2002).

131. *See* App. A, tbl. 1.

132. *Farr,* 151 F.3d. at 913.

133. *Id.* at 915.

134. *Id.* ("Defendants had a duty to provide thorough and accurate information. . .Instead, Defendants provided incomplete and misleading information about the potential tax consequences. . .we conclude that the Defendants' failure to inform Plaintiffs about the potential tax consequences of lump sum distributions constitutes a breach of their fiduciary duties, which caused individual harm to the Plaintiffs. . .").

135. *Id.* ("Although Defendants breached their fiduciary duties and Plaintiffs were damaged thereby, no remedy is available to Plaintiffs under ERISA.").

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damages, punitive damages, and a reinstatement in the plan.[136] The Ninth Circuit held that none of these remedies were allowed under ERISA.[137]

Compensatory damages were disallowed following the United States Supreme Court precedent in *Mertens v. Hewitt Assocsiates.*[138] and the Ninth Circuit precedent in *McLeod v. Oregon Lithoprint, Incorporated.*[139] In *Mertens*, the Supreme Court had held that "appropriate equitable relief" under ERISA "does not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of duty."[140] In *McLeod*, the Ninth Circuit had held that "the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute 'appropriate equitable relief.'"[141] Therefore, even when a fiduciary breaches its duty, ERISA does not provide a remedy in the form of compensatory and punitive damages.[142]

Furthermore, the Court held that the *Farr* plaintiffs were not entitled to a reinstatement in the pension plan for two reasons.[143] First, the Court noted the lack of any authority for creating such a remedy.[144] Second, even if such a remedy were statutorily available, it would not be a workable remedy in this case because of "the amount of time that has passed since Plaintiffs left the company."[145] Since ERISA did not allow compensatory damages, punitive damages, or the equitable relief of reinstatement, the plaintiffs were left without any available remedy despite the finding that defendants breached their fiduciary duty.

Judge Hawkins' concurring opinion highlighted the obvious injustice of this result.[146] He agreed that binding precedent

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136. *Id.* at 915.

137. *Id.* at 916-17.

138. *Mertens v. Hewitt Assoc.,* 508 U.S. 248 (1993).

139. *McLeod v. Oregon Lithoprint Inc,* 102 F.3d 376 (9th Cir. 1996).

140. *Farr*, 151 F.3d at 916 (interpreting *Mertens*, 508 U.S. at 257-63).

141. *Id.* (quoting *McLeod,* 102 F.3d 378).

142. *Id.* at 916.

143. *Id.*

144. *Id.*

145. *Id.* Although the Court did not make it explicit, it seems as though the problem was that if the plaintiffs were allowed to be put back into the benefits plan, they would not be going into it just as they had left it. Over time the funds, as well as the makeup of plan members had certainly changed since the plaintiffs began the litigation. Implicitly, then, the problem with the remedy of reinstatement is that it does not really accurately reflect the damages the plaintiffs suffered.

146. *Farr*, 151 F.3d at 917 (Hawkins, J., concurring).

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forced the decision that plaintiffs were not entitled to a remedy, but noted that the Supreme Court stated: "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." Yet that is exactly, according to the Supreme Court interpretation of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), what Congress has done.[147]

Since the Ninth Circuit was restrained from remedying the situation, Judge Hawkins urged Congress to respond through legislation:

> Although money damages are available under § 502(a)(3) in the form of restitution, such a remedy does not help Plaintiffs here. I recognize that ERISA is a complex set of interrelated rules that create and also limit beneficiaries' rights and remedies. But as this case so aptly demonstrates, perhaps Congress should rethink the limited remedies provided in § 502 and afford a greater range of relief to beneficiaries when a fiduciary so clearly breaches its duties.[148]

Judge Noonan also agreed that Congress should fix this inequity.[149]

3. *Griggs v. DuPont*: The Fourth Circuit view and the new possibility of reinstatement as an appropriate equitable remedy:

The Fourth Circuit has recently backed away from the inequitable result in *Farr* in *Griggs v. E.I. DuPont De Nemours & Co.*[150] The facts in *Griggs* were almost identical to those in *Farr*.[151] DuPont created a program in which its employees could rollover their funds in the event of leaving the company or early retirement.[152] Just as in *Farr*, the employer provided the eligible employees with information on the program, which included information on the tax effects of a rollover.[153] Based on this

147. *Id.*
148. *Id.*
149. *Id.* (Noonan, J., concurring).
150. 237 F.3d 371 (4th Cir. 2001).
151. *Id.* at 379.
152. *Id.* at 374.
153. *Id.* at 375. The literature on the DuPont program provided in part that:
This additional TPS benefit may be taken as a lump sum, or may be

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information, Griggs decided to retire early and roll over his interest in the plan in a lump sum, to the DuPont Savings and Installment Plan.[154] DuPont, however, did not honor Griggs' request to roll the funds over, but rather paid him the lump sum amount from another account.[155] DuPont had realized that if it were to roll over Griggs' funds from the pension plan, the plan would lose its tax-exempt status as a qualified plan under the Internal Revenue Code.[156] However, instead of notifying Griggs of this problem, DuPont merely decided to pay him the lump sum out of another account, so that it would not affect the tax status of the overall plan.[157] Since Griggs was paid a lump sum out of a non-qualified plan and not allowed to roll the funds over, he incurred a tax liability of about $50,000.[158]

Initially, Griggs filed suit claiming negligent misrepresentation by DuPont, but DuPont removed the case and the district court found that the claim was indeed preempted by ERISA.[159] The Fourth Circuit agreed, reasoning that under *Varity* and *Farr*, that the claim was of a breach of fiduciary duty under ERISA.[160]

The Court then held that DuPont did breach its fiduciary duty under ERISA by failing to provide Griggs with the information he would have needed to make an informed decision

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> added to the monthly payments under an immediate or deferred pension. If taken as a lump sum, all or part of the lump sum can be rolled into the DuPont Savings and Investment Plant (SIP), or any qualified IRA, within 60 days.
>
> Because this benefit is paid from the Pension Trust, in some cases taking the lump sum without rolling it over will cause you to incur an early payment excise tax. If that applies to you, a tax gross up allowance will be paid to offset any overall addition to your taxes. *Id.*

In addition to this information, DuPont printed the following caveat on the back of the rollover application form: "In making this election, you understand that it is YOUR responsibility to obtain independent financial and tax advice." *Id.*

154. *Griggs*, 237 F.3d at 375.

155. *Id.* at 376.

156. *See supra* note 27-28 and accompanying text. Specifically, if DuPont had paid Griggs the lump sum out of the pension plan, that payment would have been considered a benefit to a "highly-compensated individual" under § 415 of the I.R.C., and the code's limitations on such payments would have had the effect of disqualifying the entire plan from tax-exempt status. I.R.C § 415 (2000).

157. *Griggs*, 237 F.3d at 375-76.

158. *Id.* at 376.

159. *Id.* at 376-77.

160. *Id.* at 376-79 ("[Griggs'] assertion concerns a core function preformed by an ERISA fiduciary—the provision of information about plan benefits to 'permit[] beneficiaries to make an informed choice about continued participation.'" (quoting Varity Corp. v. Howe, 516 U.S. 489, 502 (1996))).

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about his options.[161] The Court stated that "a fiduciary's responsibility when communicating with the beneficiary encompasses more than merely a duty to refrain from intentionally misleading a beneficiary."[162] It also noted, "[m]oreover, a fiduciary is at times obligated to affirmatively provide information to the beneficiary."[163] The Court noted that this affirmative obligation to inform Griggs arose under the facts of this case.[164] Since DuPont specifically did not honor Griggs' request based on the tax consequences to the plan and paid him out of a wholly different fund, it clearly had the knowledge of the tax consequences.[165] Since DuPont had knowledge of the adverse tax consequences, and paid Griggs the lump sum out of the non-tax-exempt fund without warning him, the Court held that DuPont had breached its fiduciary duty under ERISA.[166]

Finally, the Court took up the question of whether ERISA provided a remedy to Griggs. Although the facts are almost identical to those the Ninth Circuit had previously addressed in *Farr*, the Fourth Circuit was not satisfied with holding that there can be no remedy in this situation, and it remanded the case back for determination of a possible equitable remedy.[167]

Perhaps relying on the decisions in *Varity* and *Farr*, Griggs conceded he could not recover any compensatory or punitive damages, but he cited the "other appropriate equitable relief" language of ERISA to try to obtain a reinstatement into the plan.[168] Relying on *Farr*, the district court had denied his request to be reinstated, concluding that, "reinstatement and return of the parties to the pre-September, 1994, *status quo* is not

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161. *Id.* at 381.

162. *Id.* at 380.

163. *Griggs*, 237 F.3d at 389.

164. The Court quoted the Restatement (Second) of Trusts on fiduciary duties:

> Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information. . . [However,] he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection. . . Restatement (Second) of Trusts § 173 cmt. d. (1959).

Griggs, 237 F.3d at 380. The Court also noted the duty "'entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.'" *Id.* (quoting Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292 (3d Cir. 1993)).

165. *Id.* at 381.

166. *Id.*

167. *Id.* at 385-86.

168. *Griggs*, 237 F.3d at 384. Note that this was the same type of relief that the Ninth Circuit had denied in *Farr*. *See supra* notes 142-148 and accompanying text.

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feasible."[169] The Fourth Circuit, however, disapproved of the district court's conclusion.[170] It reasoned that reinstatement is exactly the kind of remedy that is typically available when a plaintiff seeks a judgment in equity.[171] The Appeals Court then remanded the case back to the district court with some guidance on interpreting "other appropriate equitable relief:"

> Thus, we remand for further factual development with respect to whether the reinstatement of the parties to the pre-election status quo is appropriate. In determining whether such relief is appropriate, the district court's consideration should be broader than the question of whether it would be appropriate, or even possible at this point, to reinstate Griggs to his job. The district court should also consider whether it would be appropriate, or even possible, to return Griggs to his pre-election position so that he could make an alternate TPS distribution election. In either event, we note that because reinstatement is equitable in nature, Griggs is not entitled to a windfall; if he is reinstated, we agree with the district court that he must return his TPS benefit. Indeed, Griggs concedes that he would be required to return at least part of his TPS distribution. We will leave it to the sound discretion of the district court to consider the subtleties that will surely arise, including what portion of Griggs's benefit he must return if equitable relief is appropriate, *i.e.*, on whom the loss occasioned by the tax liability should fall.[172]

Unlike the Ninth Circuit, the Fourth Circuit seems to allow for the possibility that reinstatement to a benefits plan might

169. *Id.*

170. *Id.* at 385 ("The [district] court, however, did not specifically explain why the reinstatement or return of the parties was not a viable option and why reinstatement would not be 'appropriate' equitable relief under ERISA § 502(a)(3), other than to point out that if Griggs were reinstated he would be required to return his TPS benefit. Moreover, it is not apparent from the record whether the district court was addressing reinstatement to Griggs's position of employment, reinstatement under the plan such that Griggs could make another TPS distribution option, or both.").

171. *Id.*

172. *Id.* at 385-86.

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under some circumstances be appropriate relief under ERISA's remedies clause.

With the circuits split on the issue of whether reinstatement to a benefits plan can be an appropriate remedy for an employee who has left the plan due to the employer's breach of fiduciary duty, the current state of the law does not provide much guidance to either employees or employers. An employee who seeks relief in such a situation is left not knowing how to plead. Even if the employee can decide that his claim will be preempted by ERISA, he cannot know with any certainty whether he can get a reinstatement. If he can get reinstatement, then he is arguably made whole, but if he thinks he cannot, the situation may be far worse for the employer. If there is no remedy available under ERISA, an employee might frame his cause of action under a wholly different tort theory than that of fiduciary duty in order to avoid preemption. If he is successful in this, he will be entitled to money damages, and perhaps punitive damages, which will likely hurt the employer-business far more than a simple reinstatement would have.[173]

Similarly, businesses are left with no guidance about how to conduct themselves with regard to managing employee benefit plans. If indeed reinstatement is an available remedy, then the business will face an administrative nightmare in trying to undo the employee's withdrawal. Inevitably, the state of the fund will have changed since the employee left, and merely placing him back into the pool will not always fully compensate him. This brings up a whole other basket of questions that must be answered. What if the overall amount of funds has gone down due market changes? Does the employee who is reinstated share in this loss? How do you resolve the problem that arises when the employee-plaintiff is reinstated and takes a portion of the funds to the exclusion of other employees who stayed in the fund? Who compensates them for their loss? These are all questions that the courts have failed to resolve. Therefore, the burden of answering them would lie with the business against whom such a remedy was imposed. Since the cases on reinstatement provide little help to either employees or employers with regard to benefit plans, it seems that Judge Hawkins had the best idea when he urged Congress to pass some affirmative law to resolve this

173. Indeed for this reason it may not be wise for a business to fight a claim for reinstatement. The courts are not happy with the situation that leaves plaintiffs without a remedy and the easiest way out is to allow for a creative cause of action that successfully circumvents ERISA preemption—a cause of action that could result in massive money damages. *See id.*

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problem.[174]

4. *LaRocca v. Borden, Inc.*: The First Circuit view on reinstatement

Almost one year to the day that the Fourth Circuit decided *Griggs*, the First Circuit grappled with the same remedies question in *LaRocca v. Borden, Inc.*[175] The *LaRocca* court went one step further than the Ninth and Fourth Circuits had gone and actually ordered the plaintiffs reinstated, but with limitations.[176] *LaRocca* involved sixty retired employees who alleged Borden improperly cut them out of their benefit plans.[177] Those plaintiffs sought not only reinstatement to the plan, but also reimbursement for claims they had made while not under the plan and restitution for unjust enrichment in the form of money the company would have contributed to the plan if they had still been members.[178] They also argued that reinstatement was not a proper remedy for some of the plaintiffs who had since found other insurers and did not want to leave them to be reinstated under the Borden plan, as they did not trust Borden anymore.[179] Borden, no doubt relying upon the prior decisions in *Varity* and *Griggs*, stipulated that they breached an ERISA duty, but argued the equitable relief plaintiffs sought was not available under ERISA.[180]

The district court had granted the plaintiffs' summary judgment motion as reinstatement and as to one of these further equitable damages—the court ordered reimbursement of medical expenses to the estate of a deceased plaintiff in the group.[181] By ordering reinstatement, the district court denied the plaintiffs who claimed they did not want reinstatement an opportunity to receive a cash equivalent remedy.[182]

The First Circuit agreed that reinstatement was within the

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174. *Farr*, 151 F.3d at 917 (Hawkins, J., concurring).
175. 276 F.3d 22 (1st Cir. 2002).
176. *Id.* at 24.
177. *Id.*
178. *Id.* at 26.
179. *Id.*
180. *Id.* at 24.
181. *LaRocca*, 276 F.3d at 25. The district court reasoned that the reinstatement would be retroactive: "[e]ach of the plaintiffs will be treated as if he or she had retired on April 8, 1993, with an effective retirement date of May 1, 1993. . .Borden, Inc. will pay or cause to be paid by the Plan to designated plaintiffs the amount specified. . . ." *Id.* at 31. Mr. Paone, the deceased plaintiff was to be reimbursed via his estate pursuant to this language. *Id.*
182. *Id.* at 27.

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bounds of "other appropriate equitable relief" under ERISA, but disapproved of the retroactive reimbursement to the deceased plaintiff's estate.[183] Relying on *Varity* and disregarding *Farr*, the Court decided that the proposed reinstatement was both equitable and appropriate.[184] However, the further equitable remedies the district court had ordered did not pass this test.[185] The First Circuit noted that in some cases, such relief had been awarded to plaintiffs under similar circumstances.[186] However, in those cases, the plaintiffs did not have reinstatement as an available remedy because their benefit plans no longer existed.[187] In contrast, the *LaRocca* plaintiffs could be reinstated in their original Borden plan, a remedy the court noted was in line with the ERISA remedies provision, which "permits a beneficiary 'to recover benefits due to him under the terms of his Plan. . . .'"[188] Since the reinstatement remedy was a valid option consistent with the ERISA remedies structure, the other equitable remedies that plaintiffs sought were foreclosed as inappropriate.[189]

LaRocca has gone further than any of the other circuits in interpreting *Varity* to broadly allow reinstatement as "appropriate equitable relief."[190] However, it still disallowed any other attempts to fashion equitable relief in the form of back payments.[191] Although neither the First, Fourth, nor Ninth Circuit expressly stated so in its opinions, perhaps the courts fear that permitting any equitable relief in the form of money damages would be akin to compensatory and punitive damages, which are not allowed under ERISA. If courts fashioned an "equitable relief" in the form of money damages to all ERISA plaintiffs merely because they have no adequate remedy under the statute, then they are in essence, allowing the plaintiffs to win on what would otherwise be common law tort claims. Such decisions would circumvent the preemption provision entirely, which most courts would be disinclined to do.

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183. *Id.* at 31.

184. *Id.* at 27-28.

185. *LaRocca*, 276 F.3d at 28.

186. *Id.* at 29 (citing Jackson v. Truck Drivers Union Local 42 Health and Welfare Fund, 933 F.Supp. 1124 (D. Mass. 1996); United Steelworkers of America v. Newman-Crosby Steel, Inc., 822 F.Supp. 862 (D. R.I. 1993); Ream v. Frey, 107 F.3d 147 (3d Cir. 1997)).

187. *Id.* at 29.

188. *Id.* at 27.

189. *Id.* at 32.

190. *Compare LaRocca*, 276 F.3d at 29, *with Farr*, 58 F.3d at 1364; *see also Griggs*, 237 F.3d at 385.

191. *Supra* note 182 and accompanying text.

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5. *Knudson*: more restrictions to "other appropriate equitable relief"

The restriction in the ERISA remedies provision does not just work against aggrieved beneficiary-employees; it places a limitation on any entity seeking ERISA relief. In *Great-West Life & Annuity Insurance Company v. Knudson*, an insurance company seeking to enforce a reimbursement provision of a benefits plan contract was denied "other equitable relief."[192]

Janette Knudson was seriously injured in an automobile collision and her medical expenses were paid by her employee benefits plan.[193] She later filed a tort suit against the manufacturer of her vehicle and recovered $650,000 in a settlement agreement.[194] Knudson's plan contained a provision by which Great-West could recover any payments made by a third party up to the amount the plan had paid her.[195] Great-West subsequently filed suit to recover $411,157,11.[196] Since ERISA does not expressly provide for damages of this type, Great-West's only chance for success rested on the "other equitable relief" language in the remedies provision.[197] Instead of framing its suit in the terms of an action to recover on a contract, Great-West petitioned to enjoin Knudson from failing to reimburse the plan and claimed that its remedy was restitution, rather than contract enforcement.[198]

A five to four majority of the Court held that Great-West's action, despite being couched in terms of equity, was really seeking a legal remedy and therefore no equitable remedies were available.[199] Writing for the majority, Justice Scalia viewed Great-West's calculated language with skepticism.[200] He noted that the petitioner was seeking to hold Knudson personally liable on a contract, and this type of action seeks a legal rather than an

192. 534 U.S. 204 (2002).

193. *Id.* at 207.

194. *Id.*

195. *Id.*

196. *Id.* at 208. The settlement agreement between Knudson and the vehicle manufacturer provided for a reimbursement to the plan in the amount of $13,828.70 for past medical expenses. *Id.* Great-West never cashed the check for this amount, instead contending that the contract required reimbursement of all proceeds paid by the plan. *Id.*

197. *See* 29 U.S.C. § 1109(a) (2000).

198. Petitioner's Brief at 14, Great-West v. Knudson, 534 U.S. 204, (2002), *available at* www.westlaw.com, 2001 WL 506041.

199. *Knudson*, 534 U.S. at 221.

200. *See id.* at 210-11 (characterizing the claim as one in law rather than in equity).

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equitable remedy.[201] Thus, if the Court were to grant Great-West's (cough) "injunction," it would essentially be providing a legal remedy to the insurer, which ERISA does not authorize.[202] Furthermore, the damages sought are not properly classified as "restitution."[203] Restitution, as a remedy at law, only arises when there is no legal remedy; it is only available when a plaintiff "could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him."[204] In this case, Great-West was specifically asserting title to the reimbursement proceeds by using the benefits contract language to support its claim.[205] Since Great-West was in reality seeking a legal remedy that ERISA does not allow, it was denied recovery.[206]

Justice Ginsburg argued that Congress would not have intended to use the word "equity" in such a narrow and anachronistic fashion.[207] She argued that Congress was surely not referring to ancient times when courts were split between law and equity, but rather to the basic principle of justice that courts of law may uphold.[208] The majority saw this method as too far a stretch, noting "[i]t is not . . . our job to find reasons for what Congress has plainly done; and it is our job to avoid rendering what Congress has plainly done . . . devoid of reason and effect."[209]

It seems that what Congress "has plainly done" is disallow any recovery on a contract when the claim relates to an ERISA covered benefits plan. Justice Scalia, however, did not reach this conclusion, noting "[w]e express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners asserting state-law claims such as breach of contract would have been pre-empted by ERISA."[210] Despite not expressing an opinion on this issue, the answer is quite clear—ERISA would have preempted the contract action. The Court had already decided

201. *Id.* at 210 (quoting Wal-Mart Stores, Inc. v. Wells, 213 F.3d 398, 401 (7th Cir. 2000)).
202. *See id.* at 210-11.
203. *Id.* at 213-14.
204. *Id.* at 213 (quoting 1 Dobbs § 4.2(1), at 571).
205. *Knudson*, 534 U.S. at 210.
206. *Id.* at 212.
207. *Id.* at 224 (Ginsburg, J., dissenting).
208. *Id.*
209. *Id.* at 217-18.
210. *Id.* at 220.

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that a common law contract claim was a state law claim subject to preemption.[211] It had also decided that State laws are preempted when there is a connection with a covered benefits plan.[212] Since the majority decided that Great-West's claim was a contract claim, and the contract was the plan itself, the only conclusion that can be drawn is that such a claim would be preempted by ERISA.[213] Since ERISA offers no remedy, Great-West has no avenue for obtaining relief.

Unlike the reinstatement cases, the Great-West case provides a chilling example of how ERISA can shield an employer from any liability, regardless of what heinous actions it may take. Since reinstatement is the only equitable remedy that the courts have been willing to fashion under ERISA, it now seems that if a claim by anyone other than a previously covered employee is preempted, there can be no relief.

6. Synthesizing *Knudson* and the reinstatement cases: Did the Supreme Court implicitly overrule the decisions allowing reinstatement?

It can be argued that, based on the Supreme Court's reasoning in *Knudson*, reinstatement is no longer an available remedy under the equity provision of ERISA. The *Knudson* opinion relied on the "fine distinction" between relief at law and relief in equity to determine that the damages sought by Great-West were of the type typically sought at law.[214] Similarly, an action by an employee who is no longer covered by the plan and who seeks reinstatement into the plan might also be categorized as the type of relief sought in law, rather than in equity. Justice Scalia relied heavily on the fact that Great-West was seeking what would otherwise be a contract claim remedy.[215] However, former plan members seeking reinstatement are also in essence seeking a common law remedy; they are really seeking to recover damages from a breach of fiduciary duty under the common law.[216] It is possible, then, for the lower courts to interpret the

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211. *Supra* note 39 and accompanying text.

212. *Supra* note 45 and accompanying text.

213. This is a conclusion that Great-West must have already drawn as evidenced by its instituting the action as an ERISA claim in the first place, rather than framing it as a contract action. *See Knudson*, 534 U.S. at 205.

214. *See* David L. Bacon, *Supreme Court Bars Insurer's ERISA Suit for Damages*, Bender's Labor and Employment Bulletin, Vol. 2, No. 2 (Feb. 1, 2002), *available at* http://www.thelenreid.com/articles/article/art_114.htm.

215. *Knudson*, 534 U.S. at 209-10.

216. This point was noted in both *Griggs*, 237 F.3d at 377, *and Farr*, 151 F.3d at 915.

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Knudson opinion to deny even the remedy of reinstatement on the ground that it is essentially a relief that is typically sought in law rather than in equity. If the courts take this interpretation, there may be nothing left in equity for plaintiffs in an ERISA case to pursue. As illustrated by *Farr, Griggs, and LaRocca*, reinstatement is the best—-and perhaps the only—-equitable relief available to a former plan participant who suffers damages as a result of leaving or being cut-off from the plan.[217] If *Knundson* foreclosed this remedy, it seems that there is nothing left of the "other appropriate equitable relief" provision. It will have been judicially written out.

On the other hand, perhaps there is a distinction between the relief sought in *Knudson* and the relief sought in the reinstatement cases. In the *Knudson* opinion, Justice Scalia hinted that the issue might really be that Great-West was seeking money damages.[218] So the argument in favor of continuing to allow a reinstatement remedy, even after *Knudson*, may rest on the fact that reinstatement, while a form of relief typically sought in law, is actually an equitable relief because it does not seek money damages. Rather reinstatement seeks a remedy akin to an injunction against the business, which would require the business to treat the plaintiff as if he was a member of the plan.[219]

IV. CONCLUSION

Recent federal court decisions have shown a giant loophole in ERISA jurisprudence, namely the way in which the preemption provision and the remedies provision interact to deny certain plaintiffs any relief, even upon a showing of a legal breach and harm. This situation can be remedied in two ways: One is a change in judicial thinking, the other is a forced change in the ERISA remedies decisions by act of Congress.

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217. *See supra* Parts III(2-4).

218. He stated:

> "[a]llmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Bowen v. Massachusetts*, 487 U.S. 879, 918-19, (1988) (Scalia, J., dissenting). And "[m]oney damages are, of course, the classic form of *legal* relief." *Knudson*, 534 U.S. at 210.

219. *See* App. A, tbl. 1 (outline of factors in the remedies cases. Although the courts state that they are interpreting the literal language of ERISA, it seems that there are two x-factors that work to deny plaintiffs ERISA equitable relief: (1) seeking money damages and (2) being a third party, rather than a plan beneficiary).

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A. *Judicial Change*

A Court could remedy the ERISA damages loophole in one of two ways. It could begin to loosen the "relates to" standard of the preemption provision, or it could expand the avenues available for "other appropriate equitable relief" under the remedies provision.

It would be unlikely that the court would loosen the preemptions standard. When Congress chose to use the phrase "relates to" benefits plans to describe claims that are preempted, it chose very broad language.[220] To loosen the standard based on that phrase would likely be contrary to the drafters' intent. On the other hand, the courts could interpret the remedies clause in a much more expansive manner. The phrase "other appropriate equitable relief" can cover quite a number of possibilities.[221] The courts could begin to fashion equitable remedies for plaintiffs who are preempted and have no remedy otherwise, without omitting the word "appropriate." They need not allow every possible remedy that is typically available in equity, but they are within their rights to creatively fashion remedies because Congress specifically gave them equitable powers in this regard. As evidenced by *Knudson*, however, it is unlikely that the current Supreme Court will undertake any repair on the loophole.

B. *Congressional Change*

Arguably it should not be the Court's business to reinterpret the statute to close a loophole. Indeed, some courts have noted this point.[222] It seems that a more sound method for fixing the ERISA remedies loophole is for Congress to change the wording of either the preemption or the remedies clause. First, it could mandate preemption of a state law claim only when that claim could be brought under ERISA and the person bringing the claim could receive damages under ERISA. This would still filter out tort claims that are really ERISA claims, but would allow third parties and former employees to bring suit outside ERISA, even though their claims may tangentially "relate to" a covered benefits plan. If Congress did not want to change the preemption scheme, it could instead merely remove the word "appropriate" from the remedies clause, leaving ERISA plaintiffs with the option of seeking "other equitable relief," which would give the

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220. *Ingersoll-Rand Co.* v. McClendon, 498 U.S. 133, 138-39 (1990).

221. *Supra* notes 57-58 and accompanying text.

222. *Supra* note 148 and accompanying text.

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courts broader power to fashion remedies.

A harmed beneficiary with no remedy is not good for the employees or the employers. It leaves wrongs unredressed and harms the employee-employer relationship. Regardless of what political branch may effectuate a change to the structure of the ERISA remedies and preemption provisions, the fact remains that the ambiguity and inequities that have been created must be addressed.

Brian Poldrack

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APPENDIX

A. Table 1: Factors in ERISA remedies decisions

Case	**Venue**	**Fiduciary or Third Party Defendant**	**Equitable Remedy Sought**	**ERISA Remedy Allowed**
Mertens	U.S. Supreme Court	Third Party*	Money damages*	No remedy available
Varity	U.S. Supreme Court	Fiduciary	Reinstatement	Reinstatement was available.
Farr	9th Circuit	Fiduciary	Reinstatement, compensatory and punitive damages*	No remedy available.
Griggs	4th Circuit	Fiduciary	Reinstatement	Reinstatement was potentially available.
Knudson	U.S. Supreme Court	Third Party*	"Restitution" of money damages*	No remedy available.
LaRocca	1st Circuit	Fiduciary	Reinstatement and reimbursement of expenses	Reinstatement was available, but reimbursement was not.

* factor that seems to preclude equitable remedies