
**A REGULATORY VACUUM LEAVES GAPING
WOUNDS—
CAN COMMON SENSE OFFER A BETTER WAY
TO ADDRESS THE PAIN OF ERISA
PREEMPTION?**

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I. INTRODUCTION

A. The Statutory Backdrop

The Employee Retirement Income Security Act of 1974, as amended,¹ (“ERISA”) is expressly intended to “protect . . . participants in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.”² An important part of ERISA’s “comprehensive and reticulated”³ scheme is its broad preemptive effect, intended to foster the establishment of a uniform

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1. 29 U.S.C. §§ 1001-1461 (2006).

2. 29 U.S.C. § 1001(b).

3. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980). *See generally* Rossina Barker & Kevin O’Brien, *The ERISA Common Law and the Limits of Reticulation*, 14 BENEFITS L.J. 1, 1-2 (2001) (explaining what the courts mean when they say that ERISA is “comprehensive and reticulated”).

federal standard for employers.⁴ In this way, the dreaded “patchwork quilt”⁵ of disparate state and local benefits regulation would hopefully be avoided. Furthering what the author views as a classically appropriate use of its power to regulate interstate commerce,⁶ Congress hoped that such uniformity would benefit both employers, who would no longer have to adopt different policies depending on their employees’ location, and employees, who could benefit because a more uniform regime might reduce administrative costs and encourage employers to offer employee benefit plans.⁷

Congress coupled the broad preemptive power of ERISA with a set of express remedies, and also with an understanding that the courts would promulgate a body of common law around ERISA to preserve its legislative intent and integrity.⁸ Over the thirty-plus years since the enactment of ERISA, courts have struggled with the nature of the available remedies, and with the extent of their power to fill in some of the statute’s “gaps” by promulgating federal common law. Questions arise as to whether the courts have gone far enough in providing for adequate remedies and in their gap-filling efforts.

The courts have manifested a constrained approach to tailoring relief under ERISA on at least two fronts. First, courts have taken a narrow view of the remedies available under ERISA, such that remedies that do not fall squarely within the confines of traditional equitable remedies are deemed unavailable to the claimant.⁹ Second, the courts

4. See *infra* notes 25-50 and accompanying text.

5. ERISA: A COMPREHENSIVE GUIDE § 8.01, p. 8-3 (Paul J. Schneider & Barbara W. Freedman eds., Aspen Publishers, 2d ed. 2003); see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (cautioning against a “patchwork scheme of regulation”). See generally *Shaw v. Delta Airlines*, 463 U.S. 85, 98-99 (1983) (quoting 120 CONG. REC. 29,197 (1974) (discussing “the protection afforded [to] participants by eliminating the threat of conflicting and inconsistent State and local regulation”)).

6. U.S. CONST. art. I, § 8, cl. 3. See generally David Gregory, *The Scope of ERISA Preemption of State Law: A Study In Effective Federalism*, 48 U. PITT. L. REV. 427 (1987).

7. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (holding that Congress intended “to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and Federal Government . . . [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction”). Rep. Dent stated that the purpose of ERISA was to “eliminat[e] the threat of conflicting and inconsistent State and local regulation.” 120 CONG. REG. 29,197 (1974).

8. See *infra* notes 119-71 and accompanying text.

9. See, e.g., *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-57 (1993) (finding that ERISA’s remedies are limited to the types of relief that were “typically available in equity” such as injunction, mandamus, and restitution).

have been hesitant to use their gap-filling ability to preserve meritorious claims where there is no express statutory cause of action under ERISA.¹⁰ The result in many of these cases has been that deserving participants who have suffered injury are left without remedy or any cognizable cause of action.¹¹ These results, viewed in light of ERISA's preemptive reach, can effectively leave plaintiffs with intuitively viable claims utterly out of court.

The state of access to judicial recourse under ERISA has been criticized in recent years, not only by those in academic circles, but also by members of the judiciary themselves constrained by precedent. The howl and cry has reached several members of the Supreme Court. It will be suggested in this Article that the time has come for the courts to interpret ERISA to permit recourse to a broader range of remedies, even to permit a greater range of traditionally viable causes of action, and that no further legislative change is necessary as a predicate for the courts to do so.

B. A Growing Outcry

Several judicial opinions have noted that, under ERISA as currently interpreted, injured employees are repeatedly left without recourse. The concurring opinion in *DiFelice v. Aetna U.S. Healthcare*¹² referred to the "rising judicial chorus urging that Congress and the Supreme Court revisit what is an unjust and increasingly tangled ERISA regime."¹³ In *Aetna Health, Inc. v. Davila*,¹⁴ Justice Ginsberg's concurring opinion, in which Justice Breyer joined, cited to the *DiFelice* concurrence and joined the "rising judicial chorus" criticizing the current state of the development of the law under ERISA.¹⁵ As in *DiFelice*, the plaintiffs in *Davila* unquestionably suffered alleged harm but were deprived of any potential state-law relief and placed at the mercy of ERISA's "regulatory

10. See, e.g., *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208-09 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)) (discussing the "clear congressional intent" to make ERISA an exclusive remedy looking at Congress' decision to provide integrated civil enforcement provisions in section 502(a), and concluding that "'Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly'").

11. See *id.* at 222-23 (noting several decisions which have left persons wronged by ERISA-proscribed conduct without proper relief because ERISA failed to provide an adequate remedy).

12. 346 F.3d 442 (3d Cir. 2003).

13. See *id.* at 453 (Becker, J., concurring).

14. 542 U.S. 200 (2004).

15. *Id.* at 222 (Ginsberg, J., concurring) (citing *DiFelice*, 346 F.3d at 453 (Becker, J., concurring)).

vacuum.”¹⁶ Pointing to Supreme Court rulings in cases such as *Massachusetts Mutual Life Insurance Co. v. Russell*¹⁷ and *Mertens v. Hewitt Associates*,¹⁸ in which the Court “coupled an encompassing interpretation of ERISA’s preemptive force with a cramped construction of the ‘equitable relief’ allowable under Section 502(a)(3),” Justice Ginsburg recognized the conundrum that “virtually all state law remedies are preempted but very few federal substitutes are provided.”¹⁹ It is suggested here that the courts indeed have the present ability to fill this vacuum on multiple fronts, without the need for statutory change.

C. “Gaping Wound[s]” Left by “Regulatory Vacuum[s]”

The courts’ broad interpretation of ERISA preemption of state laws combined with their narrow construction of the relief available under ERISA has, to use language used in *Davila*, left a “regulatory vacuum”²⁰ that has opened a “gaping wound”²¹ in the law. The shortcomings manifest themselves both (i) in connection with the remedies available, which, if not available under ERISA, may fall into an abyss, and (ii) in connection with the causes of action available, which, if not cognizable under ERISA, may fall into that same abyss. It is suggested here that there is a better way to put “security” back in ERISA, and that the unifying theme is common sense.

16. *Id.* at 222. Similar language is found in *Pichoff v. QHG of Springdale, Inc.*, in which the court said:

We share appellant’s concern that her claim exists in a remedy-less “regulatory vacuum” created by ERISA’s broad preemption of state law claims and the Supreme Court’s narrow interpretation of “other appropriate equitable relief.” *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring); *see also Eichorn v. AT&T Corp.*, 489 F.3d 590, 591-94 (3d Cir. 2007) (Ambro, J., concurring in denial of petition for rehearing en banc); E. Daniel Robinson, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 MINN. L. REV. 1447, 1449-55 (2006). Nevertheless, we are bound by the precedent of this circuit and the Supreme Court.

Accordingly, the district court’s order of dismissal is affirmed. 566 F.3d 728, 732 (8th Cir. 2009); *see also Pierce v. Wells Fargo Bank*, No. C 08-1554 JF (HRL), 2009 WL 1258591, at *13 (N.D. Cal. May 5, 2009) (wherein the court completely dismissed a former employee’s claim that an oral severance promise was breached, expressly noting that it was “disturbed” by the result and that “it seems unfair that ERISA should immunize [the] employer for false promises it allegedly made with respect to the employment and benefit options that [the former employee] would enjoy”).

17. 473 U.S. 134 (1985).

18. 508 U.S. 248 (1993).

19. *See Davila*, 542 U.S. at 222 (quoting *DiFelice*, 346 F.3d at 456 (Becker, J., concurring)).

20. *Id.* at 222.

21. *Id.* at 223 (quoting *Cicio v. Does*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part)).

First, it is proposed here that the Supreme Court should embrace a more expansive understanding of the “appropriate equitable relief” under section 502(a)(3) and move away from the dichotomy between legal and equitable relief. Instead, the focus should turn to granting such equitable relief that achieves intuitively fair results.²²

Going further still, it is then suggested that the courts adopt a more flexible approach to gap-filling and draw a line that permits plan participants to bring traditional causes of action that uncontroversially would have historical viability. In doing so, the courts should allow remedies that ERISA does not expressly provide by drawing on the common sense that underlies trust²³—and other state—law principles.²⁴

II. THE MECHANICS OF ERISA PREEMPTION

Preemption is an important part of ERISA’s scheme, and has been referred to as the “crowning achievement” of the legislation.²⁵ Preemption was intended to remove the patchwork of state and federal regulation and instead provide assurance that employers would only have to follow one uniform standard, thereby lessening the administrative and compliance costs of employee benefit plans, thus encouraging their creation.²⁶ The framers of ERISA expressly recognized that high administrative costs in pension and welfare plans “would hurt rather than help the employees for whose benefit the legislation is designed.”²⁷

It is therefore not surprising that ERISA preemption arises in a variety of settings,²⁸ as discussed below.²⁹ Unfortunately, to quote

22. See *infra* Part III.

23. See generally *Beck v. Pace Int’l Union*, No. 05-1448, slip op. at 4 (2007) (stating that when an employer is determining whether it is in the role of plan sponsor or plan administrator that “inquiry . . . is aided by the common law of trusts which serves as ERISA’s backdrop”).

24. See *infra* notes 172-208 and accompanying text.

25. See 120 CONG. REC. 29,944-45 (1974) (statement of Sen. Long) Senator Long explained: We who have worked intimately on this legislation have always kept in mind that private pension plans depend for their very existence voluntary action. We know that new plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self defeating and would hurt rather than help the employees for whose benefit the legislation is designed.

Id.

26. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

27. 120 CONG. REC. 29,945.

28. Cases in which ERISA leaves a gap should be distinguished from cases in which ERISA does not address a given issue. For example, in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 841 (1988), the Supreme Court held that ERISA does not preempt a state’s anti-

DiFelice “[d]etermining whether a claim could have been brought under ERISA has proven to be anything but an exact science. In fact . . . the exercise seems to have taken on a life of its own, and not a very satisfying or productive life at that.”³⁰

A. Conflict Preemption Under Section 514

Congress included a broad preemption provision in ERISA in order to create a uniform body of law to govern employee benefit plans and pension plans.³¹ Section 514 states, in part, that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA.³² “A law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.”³³ In *Shaw v. Delta*

garnishment statute, as applied to a welfare plan, and, in *Pegram v. Herdrich*, 530 U.S. 211, 223 (2000), a medical-services organization was held not to be an ERISA plan. See Thomas R. McLean & Edward P. Richards, *Managed Care Liability for Breach of Fiduciary Duty After Pegram v. Herdrich: The End of ERISA Preemption for State Law Liability For Medical Care Decision Making?*, 53 U. FLA. L. REV. 1, 19 (2001); see also *Ky. Ass’n of Health Plans v. Miller*, 538 U.S. 329, 332, 341-42 (2003) (holding that Kentucky’s “Any Willing Provider” statute is not preempted); cf. *Hattem v. Schwarzenegger*, 449 F.3d 423, 427-29, 435 (2d Cir. 2006) (regarding the possible preemption of certain state taxes); N.Y. STATE DEP’T OF TAXATION AND FIN., CORP. TAX MEMO NO. TSB-M-06(6)C, NEW YORK STATE TAX TREATMENT OF EMPLOYEE TRUSTS FOR PURPOSES OF THE UNRELATED BUSINESS INCOME TAX (2006), available at http://www.tax.state.ny.us/pdf/memos/corporation/m06_6c.pdf (discussing how the *Hattem* holding affects New York’s UBIT). See generally Employment Retirement Income Security Act (ERISA) of 1974 § 4(b), 29 U.S.C. § 1003(b) (2006) (setting forth express exclusions from ERISA coverage). It is noted that state criminal laws are among those expressly not preempted by virtue of section 514(b)(4) of ERISA. ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4). Compare ERISA § 514(a), Op. Dep’t of Lab. 2008-02A (Feb. 8, 2008) (determining a Kentucky wage-withholding law not to be preempted, expressly focusing, inter alia, on the non-criminal nature of the law), with ERISA § 514(a), Op. Dep’t of Lab. 94-27A (July 14, 1994) (determining a wage-withholding law in New York law not to be preempted, although without discussion of the criminal-law issue). See also ERISA § 514(b)(2) (generally saving, among other things, state-law insurance regulation).

29. It is also noted that traditional (non-ERISA) concepts of preemption may apply as well. See *Boggs v. Boggs*, 520 U.S. 833, 844 (1997).

30. *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 446 (3d Cir. 2003).

31. See, e.g., *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004) (“The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.”); see also *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1995) (noting that “[the] basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans”).

32. ERISA § 514(a).

33. *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97 (1983). See generally Edward Zelinsky, *Egelhoff, ERISA Preemption, and the Conundrum of the ‘Relate To’ Clause*, 91 TAX NOTES 1917 (2001) (suggesting the best interpretation of section 514 and the “relate to” test is to “treat them as a statutory presumption for preemption”).

Airlines,³⁴ the Supreme Court stressed that preemption under section 514 was intended to be read extremely expansively.³⁵ The Court also held that state-law claims for wrongful denials of benefits “relate to” ERISA because “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted.”³⁶

B. Complete or “Field” Preemption Under Section 502

A cause of action under state law that falls within the scope of the civil enforcement provisions of ERISA section 502(a) has been held to be completely preempted by federal law.³⁷ Under section 502(a), a claim may generally be brought “by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan”³⁸ or

by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of [Title I of ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress violations or (ii) to enforce any provisions of [Title I of ERISA] or the terms of the plan.³⁹

In *Pilot Life Insurance, Co. v. Dedeaux*,⁴⁰ the Supreme Court held that Congress intended the remedies in section 502 to be the exclusive remedies for violations of rights guaranteed under ERISA.⁴¹ *Pilot Life* states:

[T]he detailed provisions of [section] 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and

34. *Shaw*, 463 U.S. at 85.

35. *See id.* at 98-99.

36. *See Davila*, 542 U.S. at 209.

37. *Id.* at 214.

38. Employee Retirement Income Security Act (ERISA) of 1974 § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2006).

39. ERISA § 502(a)(3).

40. 481 U.S. 41 (1987).

41. *Id.* at 52.

the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. “The six carefully integrated civil enforcement provisions found in [section] 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.”⁴²

Davila deals with the question of whether a Texas court could hear a claim that a health maintenance organization (“HMO”) had refused to cover certain medical services in violation of an HMO’s statutory duty to exercise ordinary care.⁴³ *Davila* holds that, if an individual could have brought his claim under ERISA section 502(a)(1)(B) and there is no other independent legal duty implicated by a defendant’s action, then the individual’s cause of action is completely preempted.⁴⁴ Further, even if a state-law claim is not preempted under section 514, if it provides an alternative remedy to those provided by section 502(a), then such cause of action would still be completely preempted by section 502(a).⁴⁵

C. Need ERISA Preempt Common Sense?

A question arises as to whether development of the remedies and common law under ERISA has been sufficient, in light of ERISA’s

42. *Id.* at 54 (quoting *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

43. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 204 (2004).

44. *Id.* at 210.

45. *See id.* at 214 n.4 (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (holding that “[e]ven if there were no express pre-emption [under ERISA section 514(a)]” of the cause of action in that case, it “would be pre-empted because it conflict[ed] directly with an ERISA cause of action”). It is noted that, generally, a defendant may not remove a case to federal court if the plaintiff’s complaint does not contain a federal claim (absent another basis to do so), even if a federal defense exists. *See, e.g., Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983). Under the “well-pleaded complaint” rule, a case generally arises under federal law if it appears “in the plaintiff’s statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.” *See Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914). However, the Supreme Court held that, if a federal statute, such as ERISA, “wholly displaces the state-law cause of action through complete pre-emption,” the defendant can remove the state claim to federal court because the cause of action, “even if pleaded in terms of state law, is in reality based on federal law.” *See Davila*, 542 U.S. at 207-08 (quoting *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003)); *see also* Memorandum Decision Re Plaintiffs’ Motion to Remand at 7-8, *Becerra v. McClatchy Co.*, No. 1:09-cv-00125 (E.D. Cal. May 27, 2009) (mem.) (holding that a defendant may not remove to federal court where a claimant merely reserves the right to seek ERISA benefits in the future without asserting a present claim).

preemptive reach and the manner in which ERISA's civil-enforcement provisions have been viewed.⁴⁶ Difficult issues would seem to be raised on at least two fronts by virtue of the juxtaposition of preemption and (i) ERISA's civil-enforcement provisions setting forth certain remedies and (ii) the manner in which common-law principles have evolved under ERISA. First, if ERISA is viewed as not providing for a particular remedy, then, as a result of preemption of state law, the remedy in question may be altogether unavailable.⁴⁷ Second, even if a sought-after remedy might be available, a plaintiff may be out of court if a benefits-related cause of action is viewed as not being cognizable under ERISA, again because of ERISA's preemptive reach and the consequent inability to pursue the cause of action in state court.⁴⁸

Being that ERISA coverage leads to preemption,⁴⁹ in a broad range of situations it will inexorably lead to the ultimate dismissal of claims if ERISA is not viewed as contemplating the sought-after remedies or asserted claims, as the case may be. It is suggested below that these infirmities are unnecessary and, moreover, antithetical to ERISA's charge,⁵⁰ and should be treated with a dose of common sense.

III. REMEDIES—IS THERE NO EQUITY IN “EQUITABLE”?

To date, the question of whether there should be a common-sense reading of the notion of “equitable” in the context of remedies available under ERISA has been largely answered in the negative, the concept being eschewed in favor of a technical, historically based analysis.⁵¹ The Supreme Court has interpreted section 502(a) to allow only traditional forms of equitable relief, such as injunction, restitution and mandamus.⁵² As a result, legal relief which may be available under state law, such as compensatory damages, is unavailable to injured plan participants or beneficiaries because ERISA preempts state law. The

46. *Cf. Franchise Tax Bd. of Cal.*, 463 U.S. at 20-21 (“What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations”) (quoting *Gully v. First Bank in Meridan*, 299 U.S. 109, 117-18 (1936)).

47. *See generally* Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. (forthcoming 2009).

48. *See generally id.*

49. *Olson v. Gen. Dynamics Corp.*, 960 F.2d 1418, 1421 (9th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992) (citing *Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349, 1357-58 (9th Cir. 1986)).

50. *See generally* Secunda, *supra* note 47.

51. *See generally id.*

52. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255-58 (1993).

unfortunate result is one in which the “Court [has] no choice but to pluck [the plaintiff’s] case out of the state court in which [the plaintiff] sought redress (and where relief to other litigants is available) and then, at the behest of [the defendant], to slam the courthouse doors in [the plaintiff’s] face and leave [the plaintiff] without any remedy.”⁵³

In *Russell*, the Supreme Court held that a fiduciary to an employee benefit plan could not be held personally liable under ERISA to a plan beneficiary for extra-contractual compensatory or punitive damages caused by improper or untimely processing of benefit claims.⁵⁴ The Court reversed the Ninth Circuit’s ruling that under section 409(a), which authorizes “such other equitable or remedial relief as the court may deem appropriate”⁵⁵ when a plan fiduciary has breached its obligation to process claims in good faith and in a fair and diligent manner, a plan beneficiary could recover both compensatory and punitive damages.⁵⁶

The Court noted that section 409(a) only authorizes the plan itself to recover against a plan fiduciary and did not authorize suits brought by individual plan beneficiaries.⁵⁷ In addressing whether a private right of

53. *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 53 (D. Mass. 1997). Even where equitable relief such as an injunction is a possible remedy, the slow pace of ERISA litigation often leaves employees without a remedy. *See Eichorn v. AT&T Corp.*, 489 F.3d 590, 592-93 (3d Cir. 2007) (Ambro, C.J., concurring). For example, in *Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007), *reh’g denied*, 489 F.3d 590 (3d Cir. 2007), the plaintiffs sued AT&T for interference with their pension rights but were unable to get any relief from the courts. *Eichorn*, 484 F.3d at 647, 658. That same year, AT&T split into three parts: AT&T, Lucent Technologies, and NCR Corporation. *Id.* at 646. The plaintiffs had pension benefits that included “bridging rights,” whereby employees who left former AT&T companies and returned within six months either to the company they left or to another of the former AT&T companies, would be eligible to “bridge” their two terms of employment, thereby continuing to accrue pension benefits as if they had never left. *Id.* at 646-47. In 1996, Lucent sold Paradyne, a subsidiary of AT&T Corp, to Texas Pacific Group, and as a condition of the sale, the defendants entered into agreements that in effect cancelled the plaintiff’s bridging rights by precluding any employee who voluntarily left Paradyne from being hired by any other division of AT&T. *Id.* at 647. The plaintiffs could have sought to enjoin AT&T and Lucent from enforcing the “anti-bridging” agreement under the definition of “equitable relief” used in *Mertens* and thereafter, but, due to the fact ERISA litigation moves slowly, “by the time the case was ready for trial, the six-month window for rehiring AT&T/Lucent employees had long passed, rendering such an injunction worthless.” *Eichorn*, 489 F.3d at 592 (Ambro, C.J., concurring).

54. *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985).

55. *Id.* at 138, 148 (citing Employee Retirement Income Security Act (ERISA) of 1974 § 409(a), 29 U.S.C. § 1109(a) (2006)).

56. *Id.* at 138.

57. *See id.* at 140. Section 409(a) of ERISA provides:

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

action for extra-contractual damages could be implied even if it is not expressly authorized by ERISA, the Court did not read into the statute anything that was not explicitly addressed, thereby treating any omissions as intentional.⁵⁸ The Court discussed the “voluminous legislative history” of ERISA, that an earlier version of the statute had contained a provision for “legal or equitable” relief, and that reference to legal relief was ultimately deleted from the version of the bill.⁵⁹ Significantly, this discussion gave rise to Justice Stevens’ much repeated dicta that “[t]he six carefully integrated civil enforcement provisions found in [section] 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.”⁶⁰

Following *Russell* was *Dedeaux*, in which the Court again articulated a broad interpretation of ERISA preemption and its narrow construction of the remedies generally available under ERISA’s civil enforcement section.⁶¹ In *Dedeaux*, the Court first noted that ERISA’s express preemption provisions were drafted to be expansive, reserving “to [the] Federal authority the sole power to regulate the field of employee benefit plans,”⁶² and held that these provisions should therefore be interpreted in an expansive manner.⁶³

The Court then echoed Justice Stevens’ sentiment in *Russell* to support its holding that the civil enforcement provisions of ERISA were intended to be the exclusive remedies:

In sum, the detailed provisions of [section] 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and

such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Employee Retirement Income Security Act (ERISA) of 1974 § 409(a), 29 U.S.C. § 1109(a) (2006).

58. *Russell*, 473 U.S. at 147 (citing *Nw. Airlines, Inc. v. Transp. Workers*, 451 U.S. 77, 97 (1981)).

59. *Id.* at 145-46.

60. *Id.* at 146.

61. *See Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 46, 54 (1987).

62. *See id.* at 46 (quoting 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent)).

63. *See id.* at 55-56.

beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.⁶⁴

The Court continued its narrow interpretation of the remedies available under the civil enforcement provision of ERISA in *Mertens v. Hewitt Associates*.⁶⁵ There, the Court addressed the issue of whether under section 502(a)(3), a nonfiduciary who knowingly participated in the breach of a fiduciary duty resulting in the inadequate funding of a qualified pension plan could be held liable for losses that the plan suffered as a result of the breach.⁶⁶ In particular, the plan participants sought to make the plan whole for the losses from the actuary's knowing participation in the breach of fiduciary duty by the plan's fiduciary by suing for "other appropriate relief" as authorized by section 502(a)(3).⁶⁷ The Court cited to *Russell* in expressing its "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'"⁶⁸

The Court went on to interpret "equitable" in the context of the civil enforcement provisions of ERISA to mean only those categories of relief that were "typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."⁶⁹ While recognizing that the appropriateness of such an interpretation was "increasingly unlikely," the Court nevertheless reaffirmed this limited meaning of "equitable," based on the reasoning that the alternative, interpreting "equitable" to mean "whatever relief a court of equity is empowered to provide in the particular case at issue," would render the word "equitable" meaningless.⁷⁰ Subsequently, in *Great-West Life & Annuity*

64. *Id.* at 54.

65. 508 U.S. 248 (1993).

66. *Id.* at 249-50. Section 502(a)(3) authorizes a plan beneficiary, participant, or fiduciary to bring a civil action "(A) to enjoin any act or practice which violates any provision of [ERISA] 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 [ERISA] or the terms of the plan." Employee Retirement Income Security Act (ERISA) of 1974 § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2006).

67. *Id.* at 253.

68. *See id.* at 254 (citing *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

69. *Id.* at 256 (emphasis omitted).

70. *See id.* at 256-58.

Insurance Co. v. Knudson,⁷¹ decided on the strength of a five-justice majority,⁷² and *Sereboff v. Mid Atlantic Medical Services, Inc.*,⁷³ a unanimous decision, the Court continued its *Mertens* path, focusing on technical distinctions in historical legal concepts between “equitable” and “legal” remedies, there in the opposite context of insurance-related claims against participants.⁷⁴

Russell, Dedeaux, and *Mertens* stand as restrictive precedent interpreting the civil enforcement provisions of ERISA which lower courts have dutifully followed.⁷⁵ *Amschwand v. Spherion Corp.*⁷⁶ is illustrative of the way in which, under the current law, an administrator’s errors may greatly injure an employee, yet leave the employee without meaningful recourse due to ERISA preemption and the lack of any sufficient federal remedies.

In *Amschwand*, the plaintiff, Mr. Amschwand, was on medical leave when Spherion, his employer and plan fiduciary, switched insurance providers.⁷⁷ According to the new provider’s “Active Work Rule,” the coverage date for employees who were ill or injured would be postponed until their first day back at work.⁷⁸ Spherion and its new insurance provider agreed that the “Active Work Rule” would be waived for employees such as Mr. Amschwand, who were not working full time due to a medical condition that preceded the change in insurance providers.⁷⁹ However, due to administrative oversight, Spherion did not waive the “Active Work Rule” for Mr. Amschwand and, unbeknownst to him, he remained subject to the new rule as he never returned to work.⁸⁰ Further, not only did Spherion fail to waive the active work requirement, but it also erroneously informed him that he enjoyed full coverage under the life insurance plan.⁸¹

71. 534 U.S. 204 (2002).

72. *Id.* at 206.

73. 547 U.S. 356 (2006).

74. *Id.* at 358, 361-63.

75. See *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d, 442, 446 (2003) (“In any event, the statute and our case law chart the path we must follow.”); see also *Eichorn v. AT&T Corp.*, 489 F.3d 590, 592 (3d Cir. 2007) (Ambro, C.J., concurring) (“Thus, to accept the *Mertens/Great-West* formulation is to accept that Congress specifically allowed ERISA participants to pursue a cause of action for interference but, with no relevant comment in the legislative history, disallowed the most natural remedy.”).

76. 505 F.3d 342 (2007), *cert. denied*, 128 S. Ct. 2995 (2008).

77. *Id.* at 343.

78. *Id.*

79. *Id.* at 343-44.

80. *Id.*

81. *Id.*

Mr. Amschwand, believing that he enjoyed full benefits under the plan, continued paying the premiums while on disability leave until his death.⁸² Following her husband's death, Mrs. Amschwand was denied benefits under the policy on the grounds that her husband had not complied with the "Active Work Rule."⁸³ Mrs. Amschwand brought a claim under ERISA section 502(a)(3) seeking the full benefits that would have accrued to the beneficiary under the life insurance policy had Spherion not breached its fiduciary duty.⁸⁴ The district court held that, while Mrs. Amschwand was entitled to the premium payments, her additional claim for monetary damages did not constitute "appropriate equitable damages" and that she could not receive the benefits of the plan to which her husband had diligently contributed.⁸⁵

In upholding the district court and following the inexorable path of the preemption/remedies precedent in which it was faced, the Fifth Circuit echoed the distinction between equitable restitution and legal restitution, and held that under section 502(a)(3) of ERISA, a claimant can only recover damages under the former.⁸⁶ According to the Fifth Circuit, equitable restitution seeks only to restore to the plaintiff the defendant's gain, while legal restitution goes further by imposing personal liability for breach of fiduciary duty.⁸⁷ The Fifth Circuit thus held that "other appropriate equitable relief" does not include extra-contractual or "make whole" damages, such as life insurance benefits, that would have accrued to the plan beneficiary but for the fiduciary's negligent misadministration of the participant's plan.⁸⁸ Under this approach, Mrs. Amschwand was only entitled to a disgorgement of the premiums and not the benefits under the plan.⁸⁹

It looked possible that the Supreme Court might revisit these issues on these disturbing facts when it asked the United States for an amicus curiae brief in connection with the petition for certiorari. In that brief, a more expansive approach to equitable relief was considered by the Solicitor General.⁹⁰ The Solicitor General asserted that the Fifth Circuit

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 345, 348.

87. *Id.* at 346.

88. *Id.* at 343.

89. *Id.* at 348.

90. Brief for the United States as Amicus Curiae Supporting Petitioner, *Amschwand v. Spherion Corp.* at 8-15, 128 S. Ct. 1493 (2008) (No. 07-841), available at [http://www.dol.gov/sol/media/briefs/Amschwand\(A\)-05-2008.pdf](http://www.dol.gov/sol/media/briefs/Amschwand(A)-05-2008.pdf).

erred in holding that section 502(a)(3) does not authorize a claim for compensatory damages against the plan fiduciary equal to the benefits the beneficiary would have received but for the fiduciary breach of duty.⁹¹ Specifically, the Solicitor General analogized this type of claim to “an action against a trustee for monetary redress of a breach of trust, an action that was typically available in courts of equity in the days of the divided bench.”⁹² Since equity provided several remedies for breach of trust, including a surcharge, which would require the fiduciary to compensate the trust for the consequences of the breach, the Solicitor General concludes that when an ERISA claim is against a fiduciary, “appropriate equitable relief” includes compensatory damages.⁹³ Whether the court in *Amschwand* was correct in its determination that there was no way under Supreme Court precedent to help Mrs. Amschwand will not be known in the immediate future, as the Court ultimately denied certiorari.⁹⁴

Another case with factual elements in some ways similar to those of *Amschwand* is *Miller v. Rite Aid Corp.*⁹⁵ *Miller* arguably illustrates the use of unorthodox reasoning that avoids the jurisprudence in this area and the arguably unfair results that could have arisen thereunder. While the plaintiff, Ms. Miller, was on medical leave, her employer replaced the insurance plan.⁹⁶ Ms. Miller did not become enrolled in the new plan because she was included in the list of employees that were not exempted from the “Active Work Rule.”⁹⁷ Upon her death, Ms. Miller’s estate was denied the death benefits under both plans.⁹⁸ The Ninth Circuit held that, since Ms. Miller was not a participant under either of the plans at the time the action was brought, her estate’s claim was not subject to ERISA; consequently, state-law remedies were not preempted.⁹⁹ *Miller* engages in an analysis that ultimately extricated the plan participant from ERISA’s supposedly protective reach, with the

91. *Id.* at 7.

92. *Id.*

93. *Id.* at 11-12, 21.

94. *Amschwand v. Spherion Corp.*, 128 S. Ct. 2995 (2008).

95. 504 F.3d 1102 (9th Cir. 2007); *see also* *Lerner v. Elec. Data Sys.*, No. 07-1730, 2009 WL 579345 at *1 (6th Cir. Mar. 9, 2009).

96. *Miller*, 504 F.3d at 1104.

97. *Id.*

98. *Id.* at 1105.

99. *Id.* at 1108-09. *Compare id.*, with *Carroll v. Los Alamos Nat’l Sec.*, No. CIV 08-0959 JB/ACT, 2009 WL 1255522 at *1, *13 (D.N.M. Apr. 28, 2009) (holding that ERISA does not preempt an employee’s claim for negligent misrepresentation regarding reimbursement for Social Security and Medicare contributions deducted from salary because the alleged misrepresentations took place before the employer’s plan was created).

result of preserving a potential cause of action.¹⁰⁰ Whether or not the *Miller* court intentionally used result-oriented reasoning to reach a claims-preserving result, the result of the *Miller* approach is to preserve a claim, albeit ironically by holding there to be no ERISA claim. It is suggested here, however, that even a possible need for these types of veritable pyrotechnic gymnastics, with questionable analytical validity, just to permit a facially valid claim, is unfortunate. Would it not be preferable for the court to have taken a more straightforward path within the ERISA scheme—to permit a claim under, instead of around, the very statute there to protect the claimant?¹⁰¹

There was some possibility that these issues would be addressed in *LaRue v. DeWolf, Boberg & Associates, Inc.*¹⁰² There, the Court was asked to decide whether a participant in a defined contribution plan can bring fiduciary breach claims under section 502(a)(2) of ERISA to recover damages to the participant's account.¹⁰³ According to *Larue*, section 502(a)(2) authorizes actions under section 409, which in turn provides for breaching fiduciaries "to make good" any losses to a plan and restore lost profits to the plan.¹⁰⁴

In *LaRue*, the plaintiff, Mr. LaRue, alleged that the fiduciary of his "ERISA-regulated 401(k) retirement savings plan," failed to make changes he requested to the investments in his plan account.¹⁰⁵ The Fourth Circuit rejected his claim on the basis that section 502(a)(2), working through section 409, contemplates only recovery by the plan.¹⁰⁶ The Fourth Circuit decision in *LaRue* can be characterized as extending a cramped reading of ERISA's remedies provisions so as, once again, to leave a plaintiff with good claims out of court.

In granting certiorari, the Court invited the Solicitor General to file

100. See generally *id.* at 1106 (providing that a petitioner "may bring a civil suit under ERISA only if [that person] was a 'participant' in an ERISA plan at the relevant time").

101. See also *Phelan v. Wyoming Associated Builders*, No. 08-8055 at 12, 21 (10th Cir. July 31, 2009) (holding that retroactive reinstatement of health coverage is available as an equitable remedy under section 502(a)(3) of ERISA). It is noted that there is legislative history indicating that the courts already have the ability to impose compensatory damages through their common-law powers. See generally H.R. REP. NO. 101-247, at 56 (1st Sess. 1989), reprinted in 1989 U.S.C.A.N. 1906, 1948 (providing that "the Committee intends the Federal courts to develop a Federal common law of remedies . . . including such remedies as the awarding of punitive and/or compensatory damages").

102. 128 S. Ct. 1020 (2008).

103. *Id.* at 1022.

104. *Id.* at 1023 n.2 (quoting ERISA § 409(a), 29 U.S.C. § 1109(a)).

105. *Id.* at 1022.

106. *LaRue v. DeWolff, Boberg & Assocs.*, 450 F.3d 570, 573-74 (4th Cir. 2006), vacated 128 S. Ct. 1020 (2008).

a brief expressing the view of the federal government on whether a participant in a defined contribution plan may sue under ERISA section 502(a)(2) to recover losses sustained to his account due to a fiduciary breach.¹⁰⁷ The Solicitor General reasoned that, since Congress stated in the statute that ERISA's goal is "to protect . . . the interests of participants in employee benefit plans' . . . it makes little sense that plans and their participants should be left with no relief when plan assets are lost through fiduciary mismanagement."¹⁰⁸ Arguably, there needed to be a resolution that would permit the plaintiff to assert his claim.

The path to such a resolution turned out to be relatively simple and straightforward. *LaRue* holds that a claim for loss under an individual account plan is indeed a claim for a loss to the plan, and that the disproportionality of the damage to one participant need not render the claim without remedy.¹⁰⁹ While *LaRue* is welcome in the reasonableness and correctness of its result, it generally does not, however, represent a significant step in the direction of filling the "regulatory vacuum"¹¹⁰ that deprives injured plan participants of relief. As decided, *LaRue* simply does not reach difficult questions regarding the extent to which technical limitations involving "equitable" remedies are problematic.¹¹¹ Rather, *LaRue* correctly identifies the claim at issue

107. Brief for the United States as Amicus Curiae at 1, *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 128 S. Ct. 1020 (2008) (No. 06-856), available at <http://www.usdoj.gov/osg/briefs/2006/2pet/6invt/2006-0856.pet.ami.inv.pdf>.

108. See *id.* at 20 (emphasis omitted) (quoting ERISA § 2(b)).

109. See *LaRue*, 128 S. Ct. at 1025-26. It is noted, however, as simple and straightforward as the final result in *LaRue* may be, Justice Roberts' concurrence may open up additional issues. See *id.* at 1026-27 (Roberts, J., concurring).

110. See *Aetna U.S. Healthcare, Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 456 (3d Cir. 2003) (Becker, J., concurring)).

111. There is uncertainty surrounding a participant's ability to enforce what are often referred to as "tax-qualification requirements" applicable to retirement plans and trusts intended to satisfy section 401(a) of the Internal Revenue Code of 1986, even where (i) the requirements at issue may well be repeated under ERISA's substantive laws, ERISA §§ 201-308, and (ii) the requirements may also be repeated or at least required to be repeated in the underlying plans themselves. See, e.g., *McCarter v. Ret. Plan for the Dist. Managers of the Am. Family Ins. Group*, 540 F.3d 649, 651-52 (7th Cir. 2008) (declining to provide for a private right of action for a tax-qualification point notwithstanding (i) a corresponding ERISA provision and regulations applicable for purposes thereof, and (ii) presumably, an implementing provision in the underlying plan). But see, e.g., *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1131 (5th Cir. 1996) (seeming to indicate its view that an ERISA requirement could support a private right of action, acknowledging that "[i]t is true that ERISA does incorporate portions of the Internal Revenue Code and Treasury regulations, in some instances, but on those occasions it does so explicitly"). Thus, the question of whether a participant may bring a cause of action to enforce a legal requirement, even one set forth under the substantive-law of ERISA, and maybe even one restated in the plan itself, is not always so clear. *West v. AK*

as a claim properly brought on behalf of a plan under an ERISA provision requiring the breaching fiduciary to make the plan whole and restore lost profits.¹¹² As the Court's discussion in *LaRue* itself indicates, a holding that a participant in a defined contribution plan does not bring a claim on behalf of the plan merely because the damage incurred affects a particular account would have been flatly and facially incorrect.¹¹³

So, then, does *LaRue* at all advance the discourse regarding whether it is time for a "gaping wound" resulting from a "regulatory vacuum" to be filled? The answer is: well, maybe, if viewed as providing a backdrop against which courts can trend towards interpreting ERISA in light of its protective purposes. As another recent example of such a focus, the Court in *MetLife v. Glenn*¹¹⁴ (essentially a sequel to the *Firestone* decision discussed below) addressed competing interests that might be at stake under ERISA, and expressly emphasized "'Congress' desire to offer employees enhanced protection for their benefits" as

Steel Corp. Ret. Accumulation Pension Plan, 484 F.3d 395 (6th Cir. 2007), is illustrative of the tension between reading ERISA remedies expansively and leaving claimants out of court, and is an example of a case resolving in the participant's favor the ability to bring a claim based on a failure to satisfy a legal requirement. In *West*, early retirees who requested to receive their pension benefits as a lump sum payment claimed that the plan's failure to use a "whipsaw calculation" constituted a violation of ERISA and sought remedy under section 502(a)(1)(B). *West*, 484 F.3d at 401. While the court dismissed the argument that damages should be granted under the equitable relief rubric because the claim was compensatory in nature, it held that recovery was possible under section 502(a)(1)(B). *See id.* at 403-05, 412. An issue was whether section 502(a)(1)(B) allows relief only for a violation of plan terms or whether it is more expansive, such that it authorizes relief for a statutory violation. *See id.* at 404-05. The Sixth Circuit in *West* stated that, "[a]lthough AK Steel has a point that [section] 502(a)(1)(B) offers redress for the recovery of benefits, enforcement of rights, or clarification of rights to future benefits under the terms of the Plan, those terms must nevertheless comply with ERISA." *Id.* at 405. The court stated that "the key issue is whether West was paid less than the full accrued benefit due him under the AK Steel Plan because of his election to receive [the] accrued benefit as a lump sum rather than as a traditional annuity." *Id.* In essence, the Sixth Circuit reasoned that West should be entitled to the full amount of the accrued benefits despite the form of distribution and that section 502(a)(1)(B) should be interpreted to achieve this result. *See also* Trayler v. Avnet Inc., No. CV-08-0918-PHX-FJM, 2009 WL 383594, at *3 (D. Ariz. Feb. 13, 2009) (citing *West* 484 F.3d at 412) (agreeing with the conclusion reached by the *West* court); Ruppert v. Alliant Energy Cash Balance Pension Plan, No. 08-cv-127-bbc, 2009 WL 357942, at *11 (W.D. Wis. Feb. 12, 2009) (certifying a class based on an improper "whipsaw calculation"). The Supreme Court has requested briefs on the question of whether to grant certiorari in *West* and the Solicitor General has filed such a brief recommending that certiorari not be granted. Brief for the United States as Amicus Curiae at 19-22, *AK Steel Corp. Ret. Accumulation Pension Plan v. West*, No. 07-663 (Dec. 2008), available at <http://www.usdoj.gov/osg/briefs/2008/2pet/6invit/2007-0663.pet.ami.inv.pdf>.

112. *See LaRue*, 128 S. Ct. at 1024.

113. *See id.* at 1022 (citing *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985)).

114. 128 S. Ct. 2343 (2008).

having heightened importance.¹¹⁵

If protection is the guiding principle, what is next? Going even further than the Solicitor General in the *Amschwand* amicus brief, the author suggests that, instead of taking the Court's approach of drawing a bright line rule dichotomizing legal and equitable remedies, the Court should take a common-sense approach to equitable relief and aim to achieve fair—indeed, “equitable”—results. It is in effect proposed here that ERISA's use of the concept of equitable relief be viewed as embodying a common-sense approach to the term “equitable,”¹¹⁶ rather than an historical or otherwise technical approach thereto.

This common-sense approach to the notion of “equitable” would better realize the Congressional intent of protecting plan participants, and would thus be more aligned with the very purpose of ERISA's adoption. As the *Davila* concurrence states, a “fresh consideration of the availability of consequential damages under [section] 502(a)(3) is plainly in order.”¹¹⁷ The author believes that to go down this path would not, as the Court suggested in *Mertens*, effectively convert the ERISA reference to “equitable relief” into a reference to “all relief,”¹¹⁸ but rather would have the courts proceed with a careful and appropriate balancing of interests, considerations, and other equities (in the plain-language sense) before proceeding to award relief.

As to the question of whether recent vague contextual movement provides enough fodder for a lower court to move on these issues, the answer may well be that it does not. It is acknowledged, particularly in light of express focus on the legal/equitable dichotomy from the Supreme Court precedent culminating in *Mertens* and its progeny, that a more common-sense approach to “equitable” relief will probably need to wait for the Supreme Court's imprimatur. Until then, the lower courts may wish in appropriate cases to continue to cry out.

IV. CAUSES OF ACTION UNDER ERISA—COMMON SENSE AND THE COMMON LAW

Moving from the remedies conundrum and the role of common

115. *Id.* at 2349 (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (discussing “competing congressional purposes” in enacting ERISA)).

116. For example, one reference dictionary defines “equitable” with a first meaning of “having or exhibiting equity: dealing fairly and equally with all concerned.” MERRIAM-WEBSTER'S ONLINE DICTIONARY (2009), available at <http://www.merriam-webster.com/dictionary/equitable>.

117. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., concurring).

118. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 258 n.8 (1993) (emphasis omitted).

sense in that context, the discussion below will address whether common sense has a role if ERISA is viewed as comprehending traditional causes of action which to date have not been permitted to proceed. Just as with remedies, if a cause of action is deemed to fall within ERISA's preemptive reach, but is viewed as not being available under ERISA, it may in effect disappear. The issues discussed above surrounding "equitable" relief may have higher visibility because the issues are so squarely posed by the structure and language of the statute and may arise more frequently. However, such a state of affairs does not mean that the issues surrounding nonexistent causes of action are any less serious and, indeed, in some ways, given the result that the entire cause of action may be preempted from the outset, the matter can be at least as grave.

Interestingly, since the issues arise against the backdrop of a potentially developing common law, it might indeed be easier for the courts to address them. Thus, while the notion of adding causes of action under ERISA may be subject to less of a current groundswell than readdressing concepts of equity, it may be the case that addressing the matter of nonexistent causes of action may be a matter that can more easily begin to be handled in the lower courts, without further Supreme Court directives.

A. Development of the Federal Common Law Under ERISA

While the notion of a federal common law to complement a statutory scheme is extremely unusual, beginning the decade after ERISA's enactment, the courts have consistently recognized Congress' intent that the courts do so under ERISA.¹¹⁹ The notion of common law got substantial attention from Justice Brennan in his concurring opinion in *Russell*, where he referred to the remarks of Senator Javits,¹²⁰ "a main architect of ERISA."¹²¹ Senator Javits, when presenting the Conference Committee report to the Senate, explicitly described the intention that

119. *E.g.*, *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 26 (1983).

120. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985) (quoting 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits)).

121. John H. Langbein, *What ERISA means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens and Great-West*, 103 COLUM. L. REV. 1317, 1343 (2003) (citing Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, in *U.S. Senate, Special Comm. on Aging, The Employee Retirement Income Security Act of 1974: The First Decade 6-25* (1984) reprinted in JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 63-64 (Foundation Press 1990)).

the courts would develop federal common law to effectuate the underlying intent of the statute, stating:

In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing State termination insurance programs, et cetera, will be superseded. It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.¹²²

While ERISA is comprehensive and reticulated, it is, in its particulars, paradoxically full of gaps. The legislative history of ERISA indicates that the drafters did not intend the statute to be all-encompassing as to details, but rather intended and expected, particularly in light of its extensive preemptive reach, that the federal courts would develop a body of federal common law to fill in the gaps.¹²³ The legislature left it to the courts to use their “wisdom and experience” to solve the remedial gap, and all but directed them to carry out the job that Congress gave them through the grant of common law power.¹²⁴

Thus, the development of federal common law to fill in “gaps” in the statute by providing appropriate causes of action where the legislators intended ERISA to preempt state law is not only appropriate in light of historical development, but is called for by the legislative history.¹²⁵ There is support in ERISA’s legislative history that the courts have underestimated their authority to tailor new remedies. For example:

The Committee believes that the legislative history of ERISA and subsequent expansions of ERISA support the view that Congress intended for the courts to develop a Federal common law with respect to employee benefit plans, including the development of appropriate remedies, even if they are not specifically enumerated in section 502 of ERISA. . . . [T]he Committee has, over the years, considered the option of amending the statute to encompass specifically several

122. 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits).

123. See H.R. REP. NO. 101-247, at 56 (1st Sess. 1989), reprinted in 1989 U.S.C.C.A.N. 1906, 1948.

124. See *id.*

125. *Id.*

additional remedies. In light of the legislative history on this issue, however, the Committee believes such action is unnecessary.

The Committee reaffirms the authority of the Federal courts to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those remedies may not be specifically mentioned in ERISA itself. In cases in which, for instance, facts and circumstances show that the processing of legitimate benefit claims has been unreasonably delayed or totally disregarded by an insurer, an employer, a plan administrator, or a plan, the Committee intends the Federal Courts to develop a Federal common law of remedies, . . . including . . . the awarding of punitive and/or compensatory damages against the person responsible for the failure to pay claims in a timely manner.¹²⁶

In the mid-1980s, the Ninth Circuit noted that the “bare terms” of the statutory provisions of ERISA were not intended to establish a comprehensive regulatory scheme on its own.¹²⁷ The court stated that Congress expressly “empowered the courts to develop, in light of reason and experience, a body of federal common law governing employee benefit plans” that would serve to supplement the statutory scheme, develop the standards that the statute only set out in general terms, and develop principles governing areas of the law regulating employee benefit plans that had previously been exclusively governed by state law.¹²⁸ With respect to the reference in the Conference Report on ERISA describing the civil enforcement provisions of the Labor-Management Relations Act of 1947 (“LMRA”),¹²⁹ the court noted that section 301 of the LMRA has been interpreted by courts as a congressional authorization for the federal courts to develop a federal

126. *Id.*

127. *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984).

128. *Id.*

129. ERISA’s conference report states:

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.*

H.R. REP. NO. 93-1280, at 327 (1974) (Conf. Rep.) (emphasis added).

common law with regard to the construction and enforcement of collective bargaining agreements.¹³⁰ The Court therefore concluded that Congress had expressed the same intent with respect to ERISA—that courts would formulate a “nationally uniform federal common law to supplement the explicit provisions and general policies set out in ERISA, referring to and guided by principles of state law when appropriate, but governed by the federal policies at issue.”¹³¹

In *Pilot Life Insurance Co. v. Dedeaux*,¹³² the Supreme Court cited this reference to the LMRA in the legislative history of ERISA.¹³³ The *Dedeaux* Court focused on the “powerful pre-emptive force of [section] 301 of the LMRA,” and concluded that this reference essentially showed that Congress was concerned with making clear its intention that all suits brought by beneficiaries or participants under ERISA-regulated plans would be treated as federal questions.¹³⁴ The Court suggested that Congress’ broad intention to preempt all state laws is at odds with the notion of a federal common law of rights and obligations under ERISA-regulated plans “if the remedies available to ERISA participants and beneficiaries under [section] 502(a) could be supplemented or supplanted by varying state laws.”¹³⁵ The Court quoted the remarks of Senator Javits that “[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans,”¹³⁶ thereby acknowledging the legislative intent that, while ERISA was to be interpreted broadly to preempt state laws, it was also intended that federal common law would be developed under ERISA to effectuate its purposes.¹³⁷ The Court has acknowledged that Congress intended the courts to supplement the statutory scheme of ERISA with

130. *Menhorn*, 738 F.2d at 1499 (quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (“The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. . . . Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.” (citations omitted))).

131. *Id.* at 1500.

132. 481 U.S. 41 (1987).

133. *Id.* at 52.

134. *Id.* at 55-56.

135. *See id.* at 56.

136. *Id.* (quoting 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits)).

137. *See generally id.* at 55-56.

federal common law, even in decisions where it has narrowly interpreted the civil-enforcement provisions of ERISA and its own authority to act thereunder.¹³⁸

As the courts have used federal common law to fill in some of the gaps within ERISA,¹³⁹ they have looked to ERISA's underlying policies as well as trust law for guidance as directed by the statute's legislative history.¹⁴⁰ Thus, in fashioning federal common law under ERISA, the courts have used the law of trusts to "[serve] as ERISA's backdrop."¹⁴¹ For example, in *Firestone Tire & Rubber Co. v. Bruch*,¹⁴² the Court addressed what standard of review should apply to decisions by a plan administrator, an issue that ERISA did not completely address, although it is a "comprehensive and reticulated statute."¹⁴³ The Court noted that both the ERISA language, as well as the legislative history, indicate that trust law should inform the interpretation of the statute.¹⁴⁴ The Court analogized the plan administrator's position to that of a trustee,¹⁴⁵ stating that an administrator's decision should be reviewed according to a deferential standard of review if the benefit plan expressly gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms.¹⁴⁶

138. *See, e.g.*, *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (citations omitted) (stating that federal common law is a "necessary expedient" that courts resort to when "compelled to consider federal questions 'which cannot be answered from federal statutes alone'"); *see also* *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 259 (1993) (citing *Firestone Fire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute.")).

139. *See, e.g.*, *Conn. Gen. Life Ins. Co. v. Riner*, F. Supp. 2d 492, 497 (W.D. Va. 2005), *aff'd*, 142 Fed. App'x 690 (4th Cir. 2005) (addressing the question of whether the principles underlying state "slayer" statutes, which generally operate to preventing a killer from receiving benefits in respect of the victim, should be given effect under ERISA); *Mack v. Est. of Mack*, 206 P.3d 98, 111 (Nev. 2009) (holding the Nevada "slayer" statute not to be preempted by ERISA); *Plucinski v. I.A.M. Nat'l Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989) (allowing recovery of contributions to a plan that were erroneously paid despite any express statutory authorization of such relief); *Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1192-93 (9th Cir. 1998) (discussing when a court would grant an employer a rescission remedy in cases where an employee lied in order to obtain coverage under a plan).

140. *See, e.g.*, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989).

141. *Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007).

142. 489 U.S. at 101.

143. *Id.* at 108-09 (citing *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)).

144. *See id.* at 110 (citations omitted) ("ERISA abounds with the language and terminology of trust law. ERISA's legislative history confirms that the Act's fiduciary responsibility provisions . . . 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'") (quoting H.R. REP. NO. 93-533, at 2358 (1973)).

145. *See id.* at 110-12.

146. *Id.* at 115; *see also* *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2350 (2008).

Another example of a gap within ERISA is that the statute does not expressly address the right to contribution or indemnity. In *Chemung Canal Trust Co. v. Sovran Bank/Maryland*,¹⁴⁷ the Second Circuit applied long-standing trust law principles in holding that, while the statute did not explicitly provide for contribution and indemnity, because a fiduciary's right to seek contribution and indemnity was a fundamental principle of equity jurisprudence governing the law of trusts, those remedies were to be incorporated into the federal common law of ERISA.¹⁴⁸ In this case, a former plan trustee was sued for breaching its duty of care with respect to investments.¹⁴⁹ The defendant impleaded members of the plan's investment committee, claiming that they not only failed to monitor the trustee, but upon learning of the breaches of the trustee's duty, they silently removed the trustee without disclosing the reason and took no other action to make the plan whole.¹⁵⁰ Although contribution is not a remedy explicitly set forth in section 502(a), the court held that incorporating contribution was an appropriate extension of ERISA.¹⁵¹

Citing precedent as well as legislative history, the court began by establishing its authority to develop federal common law, and in doing so, to draw on principles of trust law.¹⁵² The court noted that contribution "has been for over a century, and remains, an integral and universally-recognized part of trust doctrine," and concluded that it was an appropriate exercise of its authority to adopt contribution as a part of ERISA law.¹⁵³ In doing so, the court was careful to note that it was "simply following the legislative directive to fashion, where Congress has not spoken, a federal common law for ERISA by incorporating what has long been embedded in traditional trust law and equity jurisprudence."¹⁵⁴

The *Chemung* court rejected arguments based on *Russell* that the civil enforcement provisions of ERISA indicated an intent that the

147. 939 F.2d 12 (2d Cir. 1991).

148. *Id.* at 18.

149. *Id.* at 13-14.

150. *Id.* at 14.

151. *Id.* at 18.

152. *Id.* at 16 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (citations omitted) ("ERISA abounds with the language and terminology of trust law. ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'").

153. *Id.* at 16.

154. *Id.* at 16.

remedies included in section 502 were to be exclusive.¹⁵⁵ The court distinguished the *Russell* holding by noting that the remedy sought to be imposed in that case was, unlike contribution, not a traditional common law remedy.¹⁵⁶ Further distinguishing *Russell*, the court reasoned that, with respect to contribution, it was likely that Congress simply failed to consider the issue as it was focused on the welfare of the plan's participants and beneficiaries, as opposed to intentionally excluding it from the remedies available under section 502.¹⁵⁷

Based on ERISA's legislative history, the court held that Congress wanted the courts to create a federal common law of ERISA by incorporating common law trust principles including contribution among fiduciaries. A number of other courts have rejected this approach, as they view their authority to incorporate trust law as limited.¹⁵⁸ By way of comparison, a previous test for whether an action could be brought as an implied cause of action was set forth in *Cort v. Ash*.¹⁵⁹ The four *Cort* factors are: (i) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (ii) whether there is an explicit or implicit legislative intent to create or deny the remedy sought; (iii) whether such a remedy would be consistent with the underlying purposes of the statute; and (iv) whether the cause of action is one traditionally relegated to state law.¹⁶⁰

Examples of other gaps in ERISA include the general lack of a statute of limitations for non-fiduciary matters, the failure to specify the availability of a jury trial in any aspect of ERISA litigation, and the failure to identify the principles regarding when to make the awards of attorney fees in ERISA litigation and in what amounts.¹⁶¹ As another example, there can be some question as to whether a general claim for equitable estoppel is readily available under ERISA.¹⁶² Indeed, even the basic *Firestone/MetLife* analysis of plan interpretation may be viewed as

155. *Id.* at 17-18.

156. *See id.* at 18.

157. *Id.*

158. *See* Elizabeth A. Di Cola, *Fairness and Efficiency: Allowing Contribution Under ERISA*, 80 CAL. L. REV. 1543, 1550-51 (1992).

159. 422 U.S. 66 (1975).

160. *Id.* at 78.

161. *See* Langbein, *supra* note 121, at 1345.

162. *E.g.*, *Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1285-86 (11th Cir. 1990) (“[W]e find that the federal common law of equitable estoppel may be applied in this case [involving an oral interpretation of an ERISA plan.]”); *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 300 (3d Cir. 2008) (quoting *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235 (3d Cir. 1994)) (holding that an equitable estoppel claim was available, *inter alia*, under “extraordinary circumstances”).

an exercise in gap-filling.¹⁶³ Had the Court in *LaRue* held that the plaintiff's claim there was not on behalf of the plan, one wonders whether the Court would have found itself unable to discern an available claim, leaving yet another aggrieved plaintiff out of court.¹⁶⁴

This gap-filling has proceeded notwithstanding that, as *Mertens* properly notes, “[t]he authority of courts to develop a ‘federal common law’ . . . is not the authority to revise the text of the statute.”¹⁶⁵ The *Mertens* dictate against rewriting, however, should be read in the face of there being some inevitable rewriting if it is presupposed that there will be any filling of gaps at all.

The statute of limitations inquiry is particularly instructive in this regard. Section 413 of ERISA provides for a statute of limitations for fiduciary actions.¹⁶⁶ ERISA does not, however, provide for a statute of limitations for other actions.¹⁶⁷ In some sense, it seems almost obvious that there must be some statute of limitations for the actions remaining unenumerated by ERISA in section 413.

But is it really the case that courts so obviously had to fill this gap? While courts may differ in specific approach,¹⁶⁸ there is a general consensus that some statute of limitations exists as to non-fiduciary cases, regardless of the absence of a statutory provision. Therefore, it is theoretically possible to imagine that there is no statute of limitations for ERISA claims, particularly in light of the extremely specific inclusion in section 413 of a statute of limitations for some, but not all, ERISA claims.¹⁶⁹ Thus, there is no principled need to conclude that a statute of limitations emanates from the penumbra of ERISA. Regardless, the time appears to have long passed to argue that there is no statute of limitations applicable for non-fiduciary ERISA purposes. To be clear, it is not argued here that the courts should refrain from developing the appropriate statute of limitations where ERISA is silent; the situation is only used to show that once this relatively noncontroversial gap-filling is

163. See *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2350 (2008) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109-10 (1989)).

164. See *supra* notes 102-112 and accompanying text.

165. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 (1993) (citations omitted).

166. Employment Retirement Income Security Act (ERISA) of 1974 § 413, 29 U.S.C. § 1113 (2006).

167. See generally *id.* §§ 1001-1461.

168. Compare, e.g., *Meagher v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 856 F.2d 1418, 1423 (9th Cir. 1988) (applied three year statute of limitations to the ERISA claim), with e.g., *Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 193 (6th Cir. 1992) (applied fifteen year statute of limitations to the ERISA claim).

169. ERISA § 413.

acknowledged as appropriate, there becomes nothing obvious about ceasing that process at any particular point, and there is no need to assume that more substantive gap-filling is inappropriate.

So, then, why stop the triage with such items as the statute of limitations? The entire prospect of gap-filling contemplates the inferring of supplemental or other additional rules that are not inconsistent with the statutory language. This process by its nature, in order to be permitted to any extent, must amount to something less than a proscribed reinvention of the statute. So, although it is by no means suggested here that every perceived gap need be filled,¹⁷⁰ the fact that on balance some should be filled and some should not squarely frames the matter as one calling for discretion under the common law to fix where the line is drawn—and where it has been drawn to date is not necessarily at the optimal spot.¹⁷¹ Ultimately, since there is no dispute that gaps in ERISA of some sort are indeed to be filled judicially, the question becomes one of degree, not one of principle, and the author sees nothing that would prevent the appropriate line from being drawn in a place that better effectuates the purposes of the statute, and nothing that would foreclose a court from proceeding to fill gaps even where there might be material substantive implications.

B. Experimenting in the Laboratories of the Lower Courts

Some courts have been reluctant to recognize certain basic causes of action that have historically been available to those in the position of plan participants. *DiFelice* demonstrates how even a claim for simple negligence can fall by the wayside.¹⁷² In *DiFelice*, the Third Circuit

170. Cf. *Island View Residential Treatment Ctr. v. Blue Cross Blue Shield of Mass.*, 548 F.3d 24, 28 (1st Cir. 2008) (“In an ERISA case, a federal court would perhaps have ‘gap filling’ authority under federal law to provide protection for minors who could be unfairly affected by a contractual limitation, but appellant made no effort to show such a need in this case.”).

171. A countervailing argument to the one made herein is that Congress, in enacting such a reticulate and comprehensive statute, understood that it was taking the risk that any number of specific consequences flowing from the words and structure of the statute would be inconsistent with its intent. Such a result may be characterized as endemic to any effort to regulate so comprehensively. It is suggested here, however, that the consequences, to the extent that plaintiffs with fundamentally good benefits-type claims are left out of court at inception, are so basically inconsistent with the seminal purposes of ERISA that they should not be written off as some ancillary cost of preemptive legislation. See *supra* notes 2-7 and accompanying text.

172. See *DiFelice v. Aetna*, 346 F.3d 442, 453 (3d Cir. 2003). But see *Bertoni v. Stock Bldg. Supply*, 989 So. 2d 670, 672 (Fla. Dist. Ct. App. 2008) (holding that ERISA does not preempt a widow’s claim that her deceased husband’s former employer negligently failed to process his application for supplemental life insurance).

held that a plan administrator's wrongful denial of benefits constituted medical negligence and was completely preempted by section 502(a)(1)(B).¹⁷³ The plaintiff, Mr. DiFelice, alleged, "that Aetna's instruction to his treating physician that [the prescribed medical device] was 'medically unnecessary' and Aetna's insistence that [Mr. DiFelice] be discharged from the hospital before his attending physician deemed it appropriate amounted to negligent conduct under state law."¹⁷⁴ Aetna removed the case from state court to the federal district court on the grounds that the claim against it was completely preempted under ERISA and then moved to dismiss the claim completely.¹⁷⁵

Citing numerous cases holding that a claim challenging the administration of or eligibility for benefits was completely preempted by section 502(a)(1)(B) of ERISA, the Third Circuit dismissed Mr. DiFelice's claim challenging Aetna's decision declaring the device medically unnecessary.¹⁷⁶ The Third Circuit held that the claim alleging negligence regarding Aetna's decision was medically unnecessary was completely preempted by ERISA.¹⁷⁷

The *DiFelice* concurrence noted the "Serbonian bog" that has resulted from the efforts of the courts to apply the preemption test.¹⁷⁸ It asserted that "ERISA's failure to change with the times has rendered it incapable of protecting employees" but that "lower courts are bound to follow precedents that lead inexorably" to bad results.¹⁷⁹ The concurrence urged the Supreme Court to lead in the evolution of the law under ERISA:

173. See *DiFelice*, 346 F.3d at 453; ERISA § 502(a)(1)(B) ("A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.").

174. *DiFelice*, 346 F.3d at 444.

175. *Id.*

176. See generally *id.* at 444-453.

177. *Id.* at 453.

178. *Id.* at 454 (Becker, J., concurring). If a state law claim is "related to" a benefit plan, it is preempted by section 514 of ERISA. *Id.* If a state law claim is based on an eligibility decision, it would appear to be preempted by section 502 of ERISA. *Id.* But, when a state law claim is based on a medical treatment decision, it may not be preempted. *Id.* Courts have recently continued to struggle with the broad scope of ERISA preemption. See, e.g., *Barnett v. SKF USA Inc.*, No. 282 EDA 2008 ¶¶ 10-11, 18 (Pa. Super. Ct. July 13, 2009) (holding that a claim based on an employer's alleged oral agreement to provide certain specific termination rights, including early pension vesting rights, was not preempted, where the plaintiffs altogether avoided trying to bring an ERISA claim); *Johnson v. Waterfront Servs. Co.*, No. 5-07-0458, slip op. at 8-9 (5th Cir. 2009) (holding that a state-law claim for fraud is not automatically preempted in the case of inducing an individual to accept employment with the promise of plan participation).

179. *DiFelice*, 346 F.3d at 463, 465; see also *supra* note 16.

[T]he Supreme Court, in its interpretive capacity, is capable of effecting salutary change in many ways. The Court has no crystal ball, and twenty years ago it could not have foreseen the radical changes that have overtaken the health care system, and the difficulties that its preemption decisions would create.¹⁸⁰

Another example of a failure to recognize a basic cause of action, which pushes the case law in directions the author finds disconcerting, appears regarding a basic action for fraud. Rather than permitting a claim for fraud, the courts have embarked down a path of identifying a fiduciary duty to make certain disclosures in a forthright manner. In the wake of a line of cases in the lower courts,¹⁸¹ the Supreme Court in *Varity Corp. v. Howe*¹⁸² held that, where a fiduciary “participate[s] knowingly and significantly in deceiving a plan’s beneficiaries in order to save the employer money at the beneficiaries’ expense,” such fiduciary breaches his duty under ERISA to act “solely in the interest of the participants and beneficiaries.”¹⁸³

In *Varity*, plaintiffs were former employees of Massey-Ferguson who participated in the Massey-Ferguson, Inc., Self-Funded Employee Benefit Plan.¹⁸⁴ Massey-Ferguson was a wholly owned subsidiary of Varity.¹⁸⁵ In the mid-1980s, Varity decided to reorganize its financially troubled divisions, including Massey-Ferguson, into a single subsidiary called Massey Combines.¹⁸⁶ As part of its efforts to persuade the

180. *Id.* at 465.

181. In *Berlin v. Michigan Bell Telephone Company*, the plaintiffs claimed that they had retired prior to the implementation of an early retirement program under which they would have received additional severance benefits, due to their reliance on the plan fiduciary’s and the employer’s statements that no such program was likely to occur. 858 F.2d 1154, 1160 (6th Cir. 1988). There was evidence that the employer instructed that communications to employees specifically encourage retirement by indicating that no such offering was being contemplated. *Id.* The Sixth Circuit held that, where “serious consideration” was being given to offering the additional several benefits, both the employer (as the plan administrator) and the plan fiduciary had a “fiduciary duty to not make misrepresentations, either negligently or intentionally, to potential plan participants” and that “any misrepresentation[] made . . . could constitute a breach of a fiduciary duty.” *Id.* at 1163-64. Compare *id.*, with *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996) (generally holding that a plan fiduciary has no fiduciary duty to disclose potential changes to a benefit plan prior to their adoption), and *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993) (holding that fiduciaries must disclose proposed changes to plan benefits absent a specific request for disclosure only where there is “substantial likelihood” that a reasonable employee would otherwise be misled).

182. 516 U.S. 489 (1996).

183. See *id.* at 506 (quoting Employment Retirement Income Security Act (ERISA) of 1974 § 404(a), 29 U.S.C. § 1104(a) (2006)).

184. *Id.* at 492.

185. *Id.*

186. *Id.* at 493.

Massey-Ferguson employees to transfer to Massey Combines, Varsity held a meeting at which employees were provided information that was intended to assure them that their benefits would remain secure if they transferred to Massey Combines.¹⁸⁷ About 1,500 employees transferred to Massey Combines.¹⁸⁸ Massey Combines was placed into receivership in its second year of operation, and the employees as well as the retirees lost their nonpension benefits.¹⁸⁹ The Court held that “making intentional representations about the future of plan benefits in [the context of an enterprise’s future financial viability] is an act of plan administration,”¹⁹⁰ and giving deference to the District Court’s conclusion that Varsity officials communicated statements about benefits to its employees wearing their fiduciary (rather than employer) hat, and that such statements amounted to actionable fiduciary breaches.¹⁹¹

The Court in *Varsity* stated that it was not addressing the broader question of when fiduciaries had an affirmative duty to speak.¹⁹² The Court said that, given the breach of duty in *Varsity*, it “need not reach the question [of] whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.”¹⁹³ This opening has left the lower courts to struggle with the point at which a fiduciary duty to disclose arises.¹⁹⁴

To the author, *Varsity* may be viewed as a circuitous route to preserving what amounts to a traditional state-based fraud cause of action, but dressed up in fiduciary clothes. Given the overwhelming predominance of the availability of fraud actions in historical state law jurisprudence,¹⁹⁵ it seems counterintuitive that the court would not

187. *Id.* at 493-94.

188. *Id.* at 494.

189. *Id.*

190. *Id.* at 505.

191. *Id.* at 498.

192. *Id.* at 506.

193. *Id.*

194. *See, e.g.,* *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir. 1997) (“[O]ur earlier opinion made clear that the duty of loyalty requires an ERISA fiduciary to communicate any material facts which could adversely affect a plan member’s interest.”); *Ehlmann v. Kaiser Found. Health Plan of Tex.*, 198 F.3d 552, 556 (5th Cir. 2000) ([T]hese cases, which adopt a case by case or *ad hoc* approach, do not warrant the wholesale judicial legislation of a broad duty to disclose that would apply regardless of special circumstances of specific inquiry.”).

195. *See, e.g.,* 37 AM. JUR. 2D *Fraud and Deceit* § 1 (2001) (new fraud schemes are “so great that courts have always declined to define the term”); 37 C.J.S. *Fraud* § 1 (2008) (“Fraud is a generic term embracing all the multifarious means which human ingenuity can devise and are resorted to by one individual to gain an advantage over another by false suggestions or suppression of the truth.”); *see also* 60A AM. JUR. 2D *Pensions* § 98 (2003) (noting one example where a state common-law fraud action is not preempted). *See generally* 70 C.J.S. *Pensions* § 16 (2005) (“State

simply allow a fraud claim under the supposedly protective ERISA scheme. Instead, the court opted to recognize what amounts to a fraud claim as a breach of fiduciary duty.

So what is so bad about the *Varity* approach if the claim there was allowed? There are several possible problems. While some courts may have indicated that fraud can be an element of a claim for a fiduciary breach,¹⁹⁶ the point here is that fraud and similarly straightforward claims are examples of causes of action that should be recognized as such. Why should a claimant have to play a “Where’s Waldo”-type game¹⁹⁷ of finding a fiduciary to sue, just to bring a straightforward fraud claim? And even after finding that fiduciary, why should a route to a breach then have to be navigated merely to assert intentional wrongdoing?¹⁹⁸ There may well at some point come a case in which culpability is avoided on the strength of some technical non-fiduciary defense, or a failure to locate a breach. Stated another way, where a decision is forced into a rationale to reach a result that is perceived to be appropriate, there are bound to be unintended results.

For example, this course has taken us down a road of having to shoehorn what seems like facially obvious fraud claims into some type of claim that sounds in fiduciary law, spawning an arguably strange development of a “serious consideration” standard to get at certain types of dishonesty. And what will become of claims under plans for which there are no fiduciaries at all?¹⁹⁹ Eventually, the impracticality of this circuitous way of allowing fraud claims may well emerge. The potential consequences of applying *Varity* illustrate the importance of setting the right precedent, and deciding a case for the right reasons, such that a fair

laws that have not been preempted are laws of general application, being commonly traditional exercises of state power or regulatory authority, whose effect on ERISA is incidental.”).

196. *See, e.g.*, *Caputo v. Pfizer, Inc.*, 267 F.3d 181 (2d Cir. 2001) (finding that, if either a breach of fiduciary duty qualified as fraud or if the breach had subsequently been concealed in a fraudulent matter, then the six-year statute of limitations applicable to fiduciary breach cause of actions under ERISA would apply).

197. *See* MARTIN HANDFORD, *WHERE’S WALDO?* (Little, Brown & Co., 1987).

198. This course has taken us down the road of trying to identify when “serious consideration” has been given to a program the existence of which has been withheld from potentially affected participants. *See also* *Moon v. Ozark Health Inc.*, No. 4:08CV00527 JLH, 2009 WL 737321, at *1-3 (E.D. Ark. Mar. 20, 2009) (oral promise to waive 90-day waiting period unenforceable, and claim for fiduciary breach fails because claimant was not a participant at the applicable time).

199. Top hat plans are unfunded and maintained “primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees,” and are generally exempt from the fiduciary requirements under ERISA. *See* Employment Retirement Income Security Act (ERISA) of 1974 §§ 201(2), 301(a)(3), 401(a)(1), 29 U.S.C. §§ 1051, 1081, 1101 (2006).

result can be achieved not only in the case at hand but also as a matter of generally applicable rationale.

The lurching towards uncovering a fiduciary duty as a mechanism for permitting intentionally misled participants to have viable claims would be unnecessary if straightforward causes of action under ERISA for fraud were held to be available.²⁰⁰ It is submitted here that it is possible to craft a general approach that would effectively address matters such as these.

But if it is determined that broader gap-filling is permitted and appropriate, the question arises: how far does one go? Punitive damages are an example of an item not expressly covered by ERISA,²⁰¹ but would seem to implicate substantial policy concerns. Congress could reasonably have declined to provide for punitive damages in establishing national policy.²⁰² Nevertheless, to suggest that confirming the existence of a simple cause of action for rank fraud and other similar causes of action somehow implicates dangerous policy concerns seems to make an unnecessary leap.²⁰³

It seems to this author that a balanced rule that takes these concerns into account should be possible to craft. In particular, echoing some of the principles underlying the *Cort* analysis,²⁰⁴ and in deference to the

200. One could make an argument that the existence of a fraud claim under ERISA could chafe against the written-plan requirement of section 401(a)(1) of ERISA, by essentially allowing a claimant to make fraud-based claims without a written basis to do so. First, one could imagine a rule under which even the fraud claim would have to be based on written materials. Second, and perhaps moreover, it would not seem to do material violence to ERISA's principles to provide that intentional (fraudulent) wrongdoing is actionable whether or not in writing.

201. See Langbein, *supra* note 121, at 1345.

202. *But see* H.R. REP. NO. 101-247, at 55 (1st Sess. 1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 1947-48 ("Participants in ERISA covered employee benefit plans that have been [improperly denied coverage] are concerned that the Supreme Court's interpretation of ERISA . . . as preempting state laws that authorize punitive . . . damages in connection with claims for benefits effectively denies them of legal recourse.").

203. Ironically, it may well be that the case law governing equitable relief may evolve in response to judicial outcry before the case law governing causes of action, in that, to the author, an evolution regarding equitable relief would seem more clearly to require an overruling by the Supreme Court rationale. Having said that, the author acknowledges that a reappraisal of what causes of action are available under ERISA may involve a difficult-to-control slippery slope. Considerations of that type are endemic to any development of common-law considerations, and hopefully would not be sufficient to dissuade the courts from continuing to experiment in their putative laboratories in order to achieve a proper balance. See also *infra* note 207 and accompanying text.

204. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (explaining that to determine the existence of a private remedy not expressly provided in the statute, one must inquire whether: 1) plaintiff is a member of the class of which the statute intended to benefit by its enactment; 2) the legislative intent, implicitly or explicitly, permits or denies such remedy; 3) providing such remedy is

dangers posed by allowing courts to identify additional valid causes of action without restriction, it is suggested in light of ERISA's purposes and structure that: causes of actions not expressly set forth in ERISA should be cognizable where (i) they are consistently extant under the great weight of traditional common-law experience, and (ii) the recognition of their viability under ERISA would raise no substantial countervailing policy considerations.

Query whether existing precedent would necessarily have to be overruled in order to begin proceeding down this path. As the path suggested here would be another step in the development of the common law consistent with its guiding principles, the author would suggest that, on the issue of available causes of action, the courts may proceed now.²⁰⁵ To be sure, prior results would need to be overruled on a going-forward basis. The suggested approach might not require, however, a conclusion that the results in these cases were erroneous at the time they were decided or that the fundamental rationale needs to be reversed. It was sensible to provide initially for a judicious approach to the filling of gaps under the guise of a federal common law. The advocated change in scope arises from the fact that, now, it has become evident that the extent to which these gaps have been filled is insufficient to effectuate ERISA's fundamental purposes and intent. Thus, while the ultimate results should be changed, the underlying rationale and analysis can remain. As such, gaps need to be filled to allow ERISA to protect participants and their benefits, but at the same time the courts have to recognize that the gaps that need to be filled may be wider than those that the Court initially chose to fill.²⁰⁶ Simply put, the judicial

consistent with the purpose underlying the statutory scheme; and 4) the cause of action is one traditionally relegated to state law, making a federal cause of action inappropriate).

205. Thus, the author takes issue with the suggestion in *DiFelice* that the courts have no choice but rigidly to stay the existing course. *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 446 (3d Cir. 2003) ("In any event, the statute and our case law chart the path we must follow.").

206. Under the suggested rule, where ERISA preempts state law but does not offer guidance, and the states have a relatively uniform set of laws with regards to a particular issue, the courts should draw upon such state law, viewing such law through the prism of ERISA's statutory scheme and intent. It is submitted that courts should feel free to look to state-based to common law to shape an appropriate ERISA-based result, without necessarily feeling bound to import every detail of the precedent. *Cf. Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 (2009) (indicating that, while "the whole law of spendthrift trusts and disclaimers [does not necessarily turn] up in [ERISA]," certain underlying principles may be relevant); *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 246 (3d Cir. 2005) (noting that looking beyond the plan documents would break the "specific command of [ERISA]" to determine the rights of the parties solely based on documents on file with the plan); *Manning v. Hayes*, 212 F.3d 866, 870 (5th Cir. 2000) (discussing the broad scope of ERISA's preemption provisions and that the provisions are interpreted to ensure certain minimum standards in employee benefit plan administration).

development of ERISA-related case law in the “laboratories of the lower courts”²⁰⁷ now shows that expanded judicial activity in pursuit of the continuing development of the common law is necessary and appropriate.²⁰⁸ Thus, in the appropriate case, a lower court should be able to proceed down this path in advance of movement by the Supreme Court, in the spirit of implementing an evolving federal common law, consistent with the bedrock gap-filling principles that already exist, based on the judiciary’s experiences with ERISA to date.

V. BE CAREFUL FOR WHAT YOU WISH

The suggestions made herein may ring to some as being made in a spirit of judicial activism, suggesting that judges should amorphously “do the right thing.” Rather, these suggestions are made in the spirit of a statutory scheme that is designed fundamentally to allow and encourage judicial gap-filling to advance the purposes of ERISA.²⁰⁹ Importantly,

207. Georgia J. Hinde, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay*, 53 *FORDHAM L. REV.* 1291, 1308 (1985). Compare *id.*, with *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (referring to the possibility that a “single courageous state” may “serve as a laboratory”).

208. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1992) (White, J., dissenting) (citations omitted) (“Congress intended that the courts would look to the settled experience of the common law in giving shape to a ‘federal common law of rights and obligations under ERISA-regulated plans.’”).

209. The author would by no means suggest that the courts should, without restraint, simply pursue results they perceive to be protective. See *Golden Gate Rest. Ass’n v. City & County of San Francisco*, 546 F.3d 639, 648-49 (9th Cir. 2008) (holding that a municipality’s attempt to use a “pay or play” approach to address the absence of federal substantive action regarding the provision of welfare benefits is not preempted by ERISA.); see also Edward Zelinsky, *Golden Gate Restaurant Association: Employer Mandates and ERISA Preemption in the Ninth Circuit*, 47 *STATE TAX NOTES*, 603 (2008) (discussing the Ninth Circuit’s holding in *Golden Gate*). The effect of a regulatory void can be plainly seen in the health-care arena, where states and municipalities are struggling to fill a substantive void viewed by some as having been left by Congress. See *Golden Gate*, 546 F.3d at 649. When it comes to this void, some courts seem anxious to stretch the law to permit efforts to promote a pro-employee benefits agenda. See, e.g., *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 3-4 (1987) (holding that a Maine statute requiring employers to pay one week’s salary for each year worked to terminated employees in the event of a plant closing was not preempted by ERISA). To the author, *Golden Gate* shows that, while silence may not always be golden, it is not necessarily the proper place of the courts to restrict ERISA’s preemptive reach or otherwise try to be protective because at times the other ERISA policies, such as uniformity, are too strong. See McLean & Richards, *supra* note 28 at 19; see also Posting of Andrew Oringer to BNA Pension and Benefits Blog, <http://bnablog.bna.com/penben/2008/09/9th-Circuit-hol.html#comments> (Nov. 19, 2008, 16:33 EST). Indeed, even pro-employee interests may regret it if they win these battles, if the result is a patchwork quilt that causes employers to eschew the provision of employee benefits altogether. Cf. *supra* note 42 and accompanying text. But, where nothing is accomplished but a slavish adherence to some imagined ERISA construct, at the expense of leaving concededly wronged participants and beneficiaries without recourse, the courts, it is suggested here, should

the last thing that either side may want is for the courts to respond to these issues with a deafening silence, for what happens when the level of antagonism to existing rules gets too much to bear is that Congress often gets involved. Thus, not only are the courts best suited to untangle the morass in which the case law finds itself, but it is arguable that it is to the employer's advantage if Congress does not step in to regulate. To those employers and insurers who would self-interestedly argue in favor of judicial restraint and a continuation of the results that the current judicial path has produced, the author suggests being careful for what you wish²¹⁰—does anyone, on any side, really want Congressional tinkering with participants' and beneficiaries' access to the courts in this treacherous area?²¹¹ Maybe worse, once Congress does act, any

indeed look to another approach.

210. See, e.g., William W. Jacobs, *The Monkey's Paw*, HARPER'S MONTHLY, Sept. 1902, at 634, available at <http://www.harpers.org/archive/1902/09/0010358> (“‘Be careful what you wish for, you may receive it.’ –Anonymous”). When the cacophony for change and against objectionable results reaches sufficient volume, we get such actions as, in the case of corporate governance, the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), which was passed in an extreme rush, and was the subject of broad-based derision. See generally James Fanto, *A Social Defense of Sarbanes-Oxley*, 52 N.Y.L. SCH. L. REV. 517, 518, 524-25 (2007) (discussing Sarbanes-Oxley's negative impact in and interference with the capital markets). In the arena of nonqualified deferred compensation, section 409A (and more recently section 457A) of the Internal Revenue Code of 1986 has arguably made an entire group of practitioners, service recipients and service providers, wish that they had not been so successful at lobbying Congress to rein in the Internal Revenue Service. See Michael Doran, *Time to Start Over on Deferred Compensation*, 28 VA. TAX REV. 223, 224-26 (2008) (discussing the fundamental flaws of I.R.C. § 409A); see generally Andrew L. Oringer, *Release Us from Confusion Over Nonqualified Deferred Compensation*, 36 COMP. PLANNING J. (BNA), at 223 (Oct. 3, 2008) (discussing the complexities and confusion of I.R.C. § 409A (2006)); see also I.R.C. § 409A (2006), I.R.C. § 457A (2008). There have also been proposals to legislatively change disclosure requirements applicable to employee benefit plans in the wake of publicity surrounding indirect fees and other downwards pressure on the investment performance of plan assets. See, e.g., 401(k) Fair Disclosure for Retirement Security Act of 2007, H.R. 3185, 110th Cong. (2007). There is no intent here to judge the wisdom of the prior enactments and proposals; suffice it to say, however, that those in the crosshairs thereof may well wish that Congress had not perceived the need to act.

211. The politicization of benefits issues can have great impact on the tenor of the discourse about them. See generally Posting of Andrew Oringer to BNA Pension & Benefits Blog, <http://bnablog.bna.com/penben/2009/01/are-reactions-to-the-investmentadvice-regulations-illadvised.html> (Jan. 29, 2009, 14:17 EST). In recent years, Congress has attempted to amend ERISA so that injuries caused by wrongful benefits administration would be compensable by money damages. Both houses of Congress passed bills that would have subjected medically reviewable decisions to state law, so that compensatory damages can be imposed. See generally Leatrice Berman-Sandler, *Independent Medical Review: Expanding Legal Remedies To Achieve Managed Care Accountability*, 13 ANNALS HEALTH L. 233, 293-94 (2004) (citing S. 1052, 107th Cong. (2001); H.R. 2563 107th Cong. (2001)). These bills are typically very lengthy and intricate, and the descriptions below do not describe all their provisions, only the primary effects. Particularly common were requirements that administrative procedures be exhausted before suit can be filed. H.R. REP. 106-366, at 153, 223 (1999); 145 CONG. REC. 15,893 (1999). Some bills proposed

mistakes it makes can only be unwound by another legislative act.

VI. CONCLUSION

The dissent in *Cicio v. Does*,²¹² as described with approval in the *Davila* concurrence, identifies a “‘gaping wound’ caused by the breadth of preemption and limited remedies under ERISA, as interpreted by th[e] Court, [which] will not be healed until the Court ‘start[s] over’ or Congress ‘wipe[s] the slate clean.’”²¹³ Well, as Yogi Berra once said,

damage caps. See 145 CONG. REC. 15,893 (1999) (\$250,000 limit for noneconomic damages); 146 CONG. REC. 15,972 (2000) (\$350,000 maximum award). One bill would have removed preemption for suits seeking damages against a benefits provider for personal injuries or death caused by wrongful administration of “insurance, administrative services, or medical services [by other persons].” See H.R. REP. 106-366, at 4 (1999). Under the proposals, suits against an employer, group health plan, or other plan sponsor maintaining the plan for “a right of recovery, indemnity, or contribution” must be based on an exercise of discretionary authority relating to a claim for benefits coverage which resulted in the injury or death. *Id.* at 5. An earlier similar proposal would have only permitted suits against employers maintaining a group plan under state law if the employer’s coverage decision was based on an exercise of discretionary authority that resulted in injury or death. This bill also provided a cap of \$250,000 for non-economic damages. 145 CONG. REC. 15,893 (1999). Another proposal was to remove federal preemption with regard to state causes of action claiming personal injury or wrongful death arising from a medically reviewable decision. S. 1052, 107th Cong. § 402 (2001). Under this proposal, a “medically reviewable decision” was generally defined as (i) a denial based on a decision about the necessity or appropriateness of a medical procedure, (ii) a denial based on a determination that a procedure was experimental or investigational, or (iii) a decision by a healthcare professional not to cover a procedure based on medical facts of the specific case. *Id.* § 104. The bill would permit federal preemption of state law with regards to exemplary or punitive damages awards, unless it was established by clear and convincing evidence that the defendant’s conduct was committed with willful or wanton disregard for the rights or safety of others. *Id.* § 402. Punitive or exemplary damages would not be preempted in States that only allow those types of damages for wrongful death. *Id.* In 2001, the House and Senate both passed legislation that would have removed preemption from medically reviewable decisions. See Berman-Sandler, *supra* note 211, at 293-94 (citing S. 1052, 107th Cong. § 152 (2001); H.R. 2563 107th Cong. § 152 (2001)). The two bills aimed to negate ERISA preemption of state causes of action involving medically reviewable health plan determinations, although the bills differed on whether the claims would be governed by federal or state law. *Id.* at 294. This legislation also sought to create a federal cause of action for breach of “ordinary care” in coverage decisions. However, this legislation would only provide a ceiling for liability, and by removing preemption, it would leave it to the states to set the floor with their own causes of action. See H.R. REP. 107-184, at 31, 44 (2001). A Conference Committee was never appointed due to a need for increased attention on national security following the events of September 11, 2001. See Berman-Sandler, *supra* note 211, at 293-94.

212. 321 F.3d 83 (2d Cir. 2003), *vacated*, *Vytra Healthcare v. Cicio*, 542 U.S. 933 (2003), *on remand*, *Cicio v. Does*, 385 F.3d 156 (2d Cir. 2004).

213. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., concurring) (citing *Cicio*, 321 F.3d, at 106, 107 (Calabresi, J., dissenting)). One author presents the following anecdote:

A law school dean once asked me to suggest a restaurant for a dinner meeting. I named a place, but told him that we could go somewhere else if he objected to northern Italian

“When you come to a fork in the road, take it.”²¹⁴ As to the proper scope of the equitable remedies available under ERISA, it is suggested herein that the Court indeed “start over” rather than wait for Congress to “wipe the slate clean.”

As to the development of available causes of action, the suggestion is that the courts can address the matter in pursuit of developing the common law of ERISA, and that they need not wait for Congress or the Court to authorize that pursuit. The courts can do so, it is contended, without turning their backs on, or otherwise reversing, the underlying rationale and approach. That is, the courts can and need to fill gaps to the extent appropriate, albeit while acknowledging that the specific results of prior judicial application of the gap-filling approach would need to be subject to change.

Regardless of the details of where we go from here, it is at this point axiomatic that some consider aspects of the current scheme and its lack of provision for adequate recourse to be appalling.²¹⁵ The technical approach to historical remedies and restrictive approach to causes of action that have to date been pursued by the courts, leaving aggrieved and patently sympathetic claimants entirely out of court, leads this observer to wonder why it is so difficult to apply ERISA in a facially sensible manner.²¹⁶ Indeed, the path to applying ERISA’s rules can be so downright painful that we may well have lost a Supreme Court justice as a result; to quote *The Wall Street Journal* in an article about Justice Souter’s impending retirement: “Justice Souter has complained about life in Washington and even about aspects of the court’s work, such as the numbingly technical cases involving applications of pension or

cuisine. “In my book,” he replied, “anyone who objects to northern Italian should start over.” That struck me as surely right: Not liking northern Italian food must be as good an indication as any that you have made too many wrong turns and that you might as well put all your efforts down as a failure.

Doran, *supra* note 210, at 223. Hopefully, ERISA jurisprudence has not quite gotten to the level of abject “failure,” and may still be . . . fixed. *See also infra* note 220.

214. *See generally* YOGI BERRA & DAVE KAPLAN, WHEN YOU GET TO A FORK IN THE ROAD, TAKE IT!: INSPIRATION AND WISDOM FROM ONE OF BASEBALL’S GREATEST HEROES (Hyperion 2002). Admittedly digressing, the author notes that his own favorite Yogiism is, “Nobody goes there any more, it’s always too crowded.” *Id.* at 108.

215. 145 CONG. REC. 16,054 (1999) (statement of Sen. Kennedy) (commenting on Judge Letts’ remarks on ERISA that “it is the judges who are appalled at the inequity and outrageous injustice that is taking place in the Federal courts all over this country, and it is wrong”).

216. One can almost hear the Oscar Rogers character on NBC’s *Saturday Night Live* (as played by Keenan Thompson) imploring—nay, commanding—simply to . . . “FIX IT!” *Saturday Night Live: Weekend Update Thurs.*, (NBC television broadcast Oct. 23, 2008), available at http://www.nbc.com/Saturday_Night_Live/video/clips/update-freds-mapfix-it/784121/ (transcript available at <http://snltranscripts.jt.org/08/08wu3update.phtml>).

benefits law.”²¹⁷ Every now and then common sense and common law converge, and one would like to think that they need not be mutually exclusive.²¹⁸

The impassioned pleas of the concurrence in *DiFelice* have, as noted earlier, made their way into the consciousness of at least some of those on the Supreme Court.²¹⁹ The urgency of the current situation was expressed poignantly in that concurrence, as follows:

The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable. Lower courts are routinely forced to dismiss [participants'] entirely justified complaints . . . all because of ERISA, the very purpose of which was to safeguard those very participants. Our dockets grow increasingly crowded with cases where participants offer myriad varieties of artful pleadings in their desperate attempts to circumvent ERISA's procrustean reach, and our caselaw grows massively inconsistent due to the sheer complexities of the subject and lack of any meaningful guidance. There must be a better way.²²⁰

These sentiments are well expressed, and it is the author's hope that there is something herein that may aid in the path to that "better way."

217. Jess Bravin & Evan Perez, *Justice Souter to Retire From Court*, WALL ST. J., May 1, 2009, at A1, available at <http://online.wsj.com/article/SB124114676548376235.html#>. As Marvel Comics' Stan Lee might have intoned, "'Nuff said!" See generally STAN LEE & GEORGE MAIR, EXCELSIOR!: THE AMAZING LIFE OF STAN LEE 149 (Fireside 2002).

218. Cf. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 (2009) ("[c]ommon sense and common law" may lead to the same result).

219. *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring).

220. *Id.* at 47.