VII. Equitable Relief in Employment Benefit Plans

A. Introduction

The Employee Retirement Income Security Act of 1974 (ERISA) may no longer provide adequate remedies for violations of statutory fiduciary duties for certain claims.[1] The Supreme Court's narrow construction of available remedies in combination with the broad interpretation of what ERISA's civil enforcement provision preempts serve as a de facto bar to many claims brought under ERISA.[2] For these reasons, many scholars are calling to reevaluate the approach to equitable relief that contributed to its failure.[3]

This article begins with a brief roadmap of ERISA, outlining the inner-workings of the statute and continues with Part B, which delineates the civil remedies available under ERISA. Part C offers a brief history of equitable remedy jurisprudence; Part D explores the resulting injustice and harms; Part E illustrates these harms by way of a case study; Part F discusses the nexus between jurisprudence in this area and changes in the healthcare industry more generally; finally, Part G identifies certain calls for reform.

Section 502 of ERISA outlines the types of civil actions that may be brought.[4] Such civil actions vary based on both the type of claim brought and the relationship of the plaintiff to the plan.[5] The most frequently used ERISA remedial provisions include:[6] (i) claims to recover benefits or enforce or clarify rights provided by the plan's terms[7] (Plan Terms Provision); (ii) recovery on behalf of a benefit

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[1] *See* Part B. *infra* (discussing the inadequate remedies under ERISA).

[2] *See* Employment Retirement Income Security Act of 1974 § 502, 29 U.S.C. § 1132(c) (2012) (laying out the "Civil enforcement" provisions under ERISA); *see infra* notes 20–23 and accompanying text.

[3] *See infra* notes 43–46 and accompanying text (discussing the jurisprudence and general industry changes that led to this alleged failure).

[4] *Id.*

[5] Dana Muir, *From Schism to Prism: Equitable Relief in Employee Benefit Plans*, 55 AM. BUS. L.J. 599, 604 (2018).

[6] *Id.*

[7] ERISA § 502(a)(1)(B) ("A civil action may be brought (1) by a participant or beneficiary . . . (B) 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 . . . ."); Muir, *supra* note 5, at 604 (referring to ERISA § 502(a)(1)(B) as "the Plan Terms Provision").

plan[8] (Plan Recovery Provision); and (iii) catch-all relief (Catch-All Provision).[9]

Pursuant to relief under the Plan Terms Provision, if a plan was not administered according to its terms, under section 502(a)(1)(B), a participant or beneficiary may bring a claim to recover benefits due under the terms of their plan, enforce their rights, or to clarify their rights to future benefits under the terms of the plan.[10]

In terms of relief, the Plan Recovery Provision, section 502(a)(2) provides that a claim may be brought "by the Secretary, or a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."[11] Section 1109 specifies the liability standard for a breach of fiduciary duties under ERISA, which states that a breaching fiduciary must reimburse the plan for any losses caused by his breach, repay any gains wrongfully received, and provide "other equitable or remedial relief as the court may deem appropriate."[12]

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[8] *ERISA* § 502(a)(2) ("A civil action may be brought . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title . . . ."); Muir, *supra* note 5, at 605.

[9] *ERISA* § 502(a)(3) ("A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."); Muir, *supra* note 5, at 604 (referring to this provision as the "Catch-All [sic] Provision," citing Varity Corp. v. Howe, 516 U.S. 489, 512 (1996); 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, 1344 (2003)).

[10] ERISA § 502(a)(1)(B) ("A civil action may be brought (1) by a participant or beneficiary . . . (B) 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 . . . .").

[11] *Id*. § 502(a)(2).

[12] 29 U.S.C. § 1109(a) (2012) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made 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.").

The Catch-All Provision is only applicable in specific situations.[13] Namely, when a party is unable to make out a claim under the Plan Terms or Plan Recovery Provision, the Catch-All Provision steps in to allow claims asserted by a "participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan."[14] This provision also allows claims asserted by a participant, beneficiary or fiduciary to obtain "other appropriate equitable relief" to redress such violations or to enforce any provisions of the statute or plan terms.[15]

Moreover, the ability of the U.S. Secretary of Labor as well as fiduciaries to bring claims is limited; these groups are only eligible to bring claims under the Catch-All Provision and the Plan Recovery Provisions.[16] Conversely, plan participants and beneficiaries are eligible to bring claims under all three provisions.[17]

B. Civil Remedies under ERISA

ERISA governs both employee welfare benefit plans and employee pension benefit plans.[18] The statute therefore plays an instrumental role in retirement, healthcare, and other non-retirement benefits for millions of Americans.[19] Hence, the impact of its civil enforcement provision can be profound.[20]

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[13] ERISA § 502(a)(3) (allowing claims brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."). *See e.g.* Muir, *supra* note 5, at 605 (describing that in certain situations when someone who was wrongly denied health care benefits has died, the benefits are no longer owed, and there is no claim under the Plan Terms Provision, the ERISA permits an action under the Catch-All provision).

[14] ERISA § 502(a)(3).

[15] *Id.*

[16] *See* Muir, *supra* note 5, at 605.

[17] *Id.*

[18] ERISA § 3(3) ("The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.").

[19] *See* Peter K. Stris, *ERISA Remedies, Welfare Benefits, and Bad Faith: Losing Sight of the Cathedral*, 26 HOFSTRA LAB. & EMP. L.J. 387, 387 (2009)

Naturally, when ERISA has been violated by a plan fiduciary, those who have been harmed expect that they will have an avenue to obtain relief, as would be consistent with the civil laws of their state.[21] However, because of the Supreme Court's narrow construction of ERISA's civil enforcement provision, and the preemption that ERISA exercises, many people who have been harmed as the result of an ERISA violation are left without adequate relief.[22]

When a claim for healthcare is denied under ERISA, the statute mandates that the plan "provide adequate notice in writing . . . setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant."[23] Further, ERISA requires that the plan "afford a reasonable opportunity . . . for a full and fair review by the appropriate named fiduciary of the decision denying the claim."[24] Thus, administrative review is necessary following a denial of benefits.[25] In addition, when healthcare has been wrongly denied, ERISA's civil enforcement provision provides for civil remedies.[26]

For example, when a wrongful denial of healthcare occurs that results in a death or substantial injury, the nature of such harm "often leads to non-economic injuries (i.e., pain and suffering) and extra-contractual economic injuries (i.e., lost wages due to a worsened medical condition)."[27] These types of injuries would normally be

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(citing JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, A POLITICAL HISTORY 1, 1–2 (2004).

[20] *See* Stris, *supra* note 19, at 387.

[21] *See id.* at 389.

[22] *See* Part C–D. *infra* (discussing the inadequate remedies under ERISA).

[23] *See* Employment Retirement Income Security Act of 1974 § 503(1), 29 U.S.C. § 1133(1) (2012).

[24] *Id.* § 503(2).

[25] *Id.*

[26] Employment Retirement Income Security Act of 1974 § 502(a), 29 U.S.C. § 1132(c) (2012) (explaining the civil redress available under ERISA); *See* Part A–D *infra* (explaining the civil enforcement provisions under ERISA).

[27] Stris, *supra* note 20, at 393–94.

sufficient to establish a cause of action for civil redress.[28] However, because ERISA governs these plans, they are subject to its authority.[29]

Therefore, there are three options to make out this claim under ERISA.[30] However, they all fail to address the type of harms that are typical following a wrongful denial of healthcare.[31] First, the Plan Recovery Provision has limited application to matters involving wrongful denial of benefits, as it limits recovery to recovering plan losses and disgorgement of profits against a breaching fiduciary.[32] Thus, it "can apply in litigation involving the handling of welfare benefits but only if the plan is funded and the dispute involves the mismanagement of its assets."[33] Hence, it bears no significance to claims involving non-economic and extra-contractual injuries.[34]

Next, the Plan Terms Provision also fails to redress these types of harms, as it has been strictly construed to allow "only the recovery of benefits due under a plan."[35] The Catch-All Provision similarly fails.[36] However, this failure is due to the Supreme Court's decision to limit the recovery available under this provision only to "equitable relief."[37] Thus, what constitutes "equitable relief" is decisive regarding whether

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[28] *Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48 (1987) (finding that although plaintiff's claims for breach of contract, negligent and intentional infliction of emotional distress would constitute violations of Mass. Gen. L. ch. 93A, because these injuries were the result of a denial of plan benefits, they are preempted).*

[29] *See* Employment Retirement Income Security Act of 1974 § 514(a), 29 U.S.C. § 1132(c) (2012) ("[T]he provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.").

[30] *See supra* Section A.

[31] *See* Section B.1 *infra* (discussing ERISA's civil enforcement prong's applicability).

[32] ERISA § 502(a)(2) (allowing recovery for injuries that are the result of plan losses and disgorgement of profits against a breaching fiduciary); Stris, *supra* note 20, at 393 n.37 ("Section 502(a)(2) permits litigation against a breaching plan fiduciary in order to recover plan losses or disgorge fiduciary gains.").

[33] Kris, *supra* note 20, at 393 n.37.

[34] *Id.*

[35] Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 436 (2000).

[36] *Mertens v. Hewitt Assocs., 508 U.S. 248,* 255–58, 261 *(1993).*

[37] *Id.* (finding that compensatory damages do not constitute equitable relief under the Catch-All Provision of ERISA).

these harmed individuals are able to bring a claim for civil redress under ERISA.[38]

Further, the significance of the Supreme Court's decision in this area is exacerbated by the preemption of other civil claims that ERISA exerts.[39] Section 514(a) of ERISA expressly preempts any state law cause of action that would allow a claimant to dispute a benefit determination.[40] Moreover, if somehow a claim survived Section 514(a)'s muster, Section 502(a) of ERISA steps in to prohibit any claims under ERISA that allow consequential or punitive damages.[41] To be sure, in order to survive Section 514(a)'s muster, a claim would either have to be deemed not to "relate to" an employee benefit plan, or the claim would need to be considered "any law of any State which regulates insurance, banking, or securities" under Section 514(b)(2)(A) of ERISA.[42] This is limited mostly to those state laws that are part of the "state law 'regulating insurance.'"[43] Hence, if a claim for relief does not constitute "equitable relief" under the Supreme Court's jurisprudence, that harmed party will have no available remedy at all.[44]

Because so much turns on the Supreme Court's role in this area of law, a look at the history of the Supreme Court's jurisprudence regarding ERISA is necessary to understanding the underlying complexity.[45]

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[38] Stris, *supra* note 20, at 395 ("The fact that consequential and punitive damages are not available to a litigant under ERISA means that they are not available at all.").

[39] *Id.* (citing Richard A. Epstein & Alan O. Sykes, *The Assault on Managed Care: Vicarious Liability, ERISA Preemption, and Class Actions*, 30 J. LEGAL STUD. 625, 631 (2001) ("All courts seem to agree that disputes over the coverage of an employee benefit plan relate to the administration of the plan and thus come within ERISA's general preemption clause.")).

[40] *See* Employment Retirement Income Security Act of 1974 § 514(a), 29 U.S.C. § 1132(c) (2012).

[41] *Id.* § 502(a) (prohibiting any claims under ERISA that allow consequential or punitive damages); Stris, *supra* note 20, at 395.

[42] ERISA § 514(b)(2)(A). *See also* Stris, *supra* note 20, at 395 n. 45.

[43] Stris, *supra* note 20, at 395 (citing Epstein & Sykes, *supra* note 39 at 631–32 ("[S]tate law is preempted unless it is part of the state law 'regulating insurance.' Even then, it will be preempted to the extent that it purports to provide any 'remedy' for the denial of benefits . . . .")).

[44] Stris, *supra* note 20, at 395.

[45] Muir, *supra* note 5, at 601 (citing Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief under ERISA Section 502(A)(3), 39* J. MARSHALL L. REV. 827, 941–42 (2006).

C. Brief History

Cigna Corp. v. Amara marked the first time that the Supreme Court directly addressed whether the requested relief against a breaching fiduciary could constitute appropriate equitable relief under a claim participants brought under the Catch-All Provision.[46]

Prior to *Amara*, in two earlier Catch-All Provision cases, the Supreme Court held that determining whether a claim for restitution is a legal or equitable remedy depends both on the basis for the plaintiff's claim and the nature of the underlying remedy sought.[47] Thus, in order to make out a claim for relief under section 502(a)(3)(B), the underlying remedy and the nature of the claim must be equitable.[48] Further, the Court held in *Great-West Life & Annuity Insurance Co. v. Knudson* that when deciding what is equitable relief, "legal relief" is to be treated as separate and distinct.[49]

Although the *Amara* Court did not explicitly use this two-part analysis to make the determination that the relief sought was equitable, it grounded its decision in the notion that historically a claim against a trustee may only be brought in equity.[50] Moreover, the Court concluded that in almost all claims against trustees, remedies would be available under the Catch-All Provision so long as they closely resembled traditional equitable remedies.[51] This appears to be a straight-forward application of the earlier *Great-West* test and principles of trust law; however, its complexity is revealed when a

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[46] Muir, *supra* note 5, at 605–06 (citing Cigna Corp. v. Amara, 563 U.S. 421, 435–438 (2011).

[47] Sereboff v. Mid Atl. Med. Servs., 547 U.S. 356, 363 (2006) ("To decide whether the restitutionary relief sought by Great-West was equitable or legal, we examined cases and secondary legal materials to determine if the relief would have been equitable '[i]n the days of the divided bench.'"); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2001) (explaining that the difference between a legal remedy and an equitable will be based on a finding regarding that both the underlying remedy and the nature of the remedy sought are equitable).

[48] *Great-West Life*, 534 U.S. at 213.

[49] *Id.* at 220–21.

[50] *Amara*, 563 U.S. 421 at 439.

[51] Muir, *supra* note 5, at 608 ("[The *Amara* Court] concluded that nearly all remedies against trustees were traditionally considered equitable remedies and that in claims against trustees, remedies would be available under the Catch-All [sic] Provision so long as they closely resemble traditional equitable remedies.").

contrasted with the history of the split among judges regarding equitable relief under ERISA.[52]

In *Mertens v. Hewitt Associates*, the Supreme Court decided that the Catch-All Provision limited both the type of relief available under it, and who the claims can be asserted against.[53] Given the pivotal role that the Supreme Court's definition of "equitable relief" holds here, the significance of this decision cannot be understated.[54] The dissent sided with the retirees in this case, arguing that incorporating trust law concepts into ERISA is consistent with its purpose because the legislative history indicates Congressional intent to do so and is consistent with ERISA's requirement that pension plan funds to be held in trust.[55] This interpretation places no limit on the relief available under the Catch-All Provision.[56] Thus, the dissent's interpretation would allow this subset of claimants who are wrongfully denied healthcare to recover under ERISA's civil enforcement prong.[57]

The majority came to the opposite conclusion.[58] After examining the text of the statute, the majority concluded that the word "appropriate" in the Catch-All Provision was intended to limit the types of available relief to include only those typically available in equity (such as injunction, mandamus, and restitution), thereby excluding the retirees' claim for compensatory damages.[59] This decision forged a

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[52] Muir, *supra* note 5, at 608.

[53] *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) (holding that ERISA does not authorize suits for money damages against parties who knowingly participate in a breach of their fiduciary duty, nor does ERISA's Catch-All Provision's "appropriate equitable relief" include compensatory damages, which are a form of legal relief).

[54] *See* Stris, *supra* note 20, at 394–95.

[55] *Mertens*, 508 U.S. at 264–66 (arguing the Congressional intent that surrounded the enactment of ERISA dictates the Court look at the common law of trusts contemplated by § 502(a)(3) when construing the relief available under it).

[56] *Id.* at 265 n.1.

[57] *Id.*

[58] *Id.* at 258 (finding that the statutory language of the Catch-All Provision does not warrant the dissent's interpretation that it includes all forms of relief available at common law for breach of trust).

[59] *Id.* ("Regarding 'equitable' relief in § 502(a)(3) to mean 'all relief available for breach of trust at common law' would also require us either to give the term a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between 'equitable' and 'reme-

noticeable schism between the judges regarding what constitutes "equitable relief."[60] For example, the dissent contended that the majority's interpretation has "the perverse and, in this case, entirely needless result of construing ERISA so as to deprive beneficiaries of remedies they enjoyed prior to the statute's enactment."[61]

D. Potential Impact

The effect of the jurisprudence in this area is regarded as both substantial and disheartening.[62] Because private sector retirement accounts now hold more than $20 trillion in assets, and because of the special protections that certain employee benefits, such as life, disability and health insurance provide to employees and their families, the effect that limiting the available remedies has on harmed individuals can be heartbreaking.[63]

Moreover, because of the Supreme Court's broad interpretation of ERISA's preemption provision, the possibility of recovery for a wrongful death, personal injury, or other potential claim under state law for the wrongful denial of healthcare benefits, is preempted.[64]

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dial' relief in § 409(a), and between 'equitable' and 'legal' relief in the very same section of ERISA . . . .").

[60] Muir, *supra* note 5, at 608 (explaining the "virulent" schism between judges as a result of "equitable remedy" jurisprudence).

[61] *Mertens, 508 U.S.* at 274.

[62] Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 65 (D. Mass. 1997) ("Although the alleged conduct of Travelers and Greenspring in this case is extraordinarily troubling, even more disturbing to this Court is the failure of Congress to amend a statute that, due to the changing realities of the modern health care system, has gone conspicuously awry from its original intent. Does anyone care? Do you?"); Muir, *supra* note 5, at 600 (describing how "cases involving failures in the benefits system affect individuals and can tug at heartstrings," citing *Andrews-Clarke*, 984 F. Supp. at 65).

[63] Muir, *supra* note 5, at 600 (citing John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1315 (2007).

[64] 29 U.S.C. § 1144(a) (2012) (providing that, subject to certain exceptions, Section 514(a) states that ERISA shall "supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."); *Id.* § 1144(c)(1) (explaining that the term "state law" encompasses statutory mandates, court decisions, and all other sources of state law). *See* Shaw v. Delta Airlines, Inc. 463 U.S. 85, 96–97 (explaining the breadth of ERISA's preemption language when determining whether a state law "relates to" an employment benefit plan); *Andrews-Clarke*, 984 F. Supp. at 55 ("At the

Thus, recovery under the Catch-All Provision becomes the only option for this subset of recovery claims.[65] However, because of the Supreme Court's traditionally narrow construction of the available remedies under the Catch-All Provision, many individuals are left without adequate remedies for breaches of fiduciary claims.[66]

Among those subject to harm are "the employees and their families who rely on benefit plans," as well as "employees who sponsor those plans," and "the many third-party actors involved in benefit plan administration."[67] However, out of all of these harmed parties is a subset of claimants who are systematically harmed under this scheme: those individuals who bring a claim against a fiduciary for a wrongful death that resulted from a wrongful denial of health care benefits are left without recovery under ERISA.[68] The facts of *Andrews-Clarke v. Travelers Ins. Co.* are illustrative.[69]

E. Claims for Redress Following a Wrongful Denial of Heath Care

In *Andrews-Clarke*, an individual was wrongly denied health care treatment and subsequently died.[70] The individual's heirs' only option was to bring a claim for relief under the Catch-All Provision, as is typical in such a situation.[71] Any cognizable state claim that the heirs had was preempted by ERISA, which is standard.[72] Moreover, neither

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same time, however, it is undisputed that ERISA's civil enforcement provision does not authorize recovery for wrongful death, personal injury, or other consequential damages caused by the improper refusal of an insurer or utilization review provider to authorize treatment.").

[65] Muir, *supra* note 5, at 605.

[66] *See supra* notes 20–23 and accompanying text (discussing the Court's narrow construction of the Catch-All provision in *Mertens*).

[67] *See* Muir, *supra* note 5, at 601.

[68] *See* Stris, *supra* note 20, at 395 (2009) ("[M]any welfare plan participants and beneficiaries who suffer serious or fatal injuries allegedly caused by the wrongful handling of a benefits claim have been left with no meaningful judicial remedy.").

[69] *See* Section E. *infra* (explaining the facts of *Andrews-Clarke*).

[70] *Andrews-Clarke*, 984 F. Supp. at 49, 52.

[71] Muir, *supra* note 5, at 655 (citing *Andrews-Clarke*, 984 F. Supp. at 55 n.26 (explaining that injunctive relief could not be granted under the Catch-All provision because of the Supreme Court's decision in *Mertens*)).

[72] *See* 29 U.S.C. § 1144(a) (2012) ("[T]he provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now

the Plan Terms Provision nor the Plan Recovery Provision provided a cognizable legal claim for these heirs.[73] In this case, because the Plan Terms Provision can only require the payment of benefits, the usefulness of such treatment expired at the individual's death.[74]

Even though the heirs were able to make a claim under the Catch-All Provision, because the remedy they were seeking did not qualify as "equitable" under the Supreme Court's definition in *Mertens*, the decedent's family was left without any remedy for the breach.[75]

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or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."). *See also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) ("Unless these common law causes of action fall under an exception to* § 514(a), therefore, they are expressly pre-empted."); *Wickman v. Nw. Nat'l Ins. Co.,* 908 F.2d 1077, 1081–82 (1st Cir. 1990) ("[C]ommon law contract and torts claims asserting the improper processing of a claim for benefits under an ERISA regulated insurance policy are preempted.").

[73] *Andrews-Clarke*, 984 F. Supp. 49 at 55 n.26 ("Diane Andrews–Clarke does not seek 'to recover benefits due to [Clarke] under the terms of [the] plan, to enforce [Clarke's] rights under the terms of the plan, or to clarify [Clarke's] rights to future benefits under the terms of the plan,' pursuant to 29 U.S.C. § 1132(a)(1)(B). Similarly, due to Clarke's tragic death, any kind of injunctive relief pursuant to section 1132(a)(3) to enforce Clarke's rights under the plan is no longer viable. Finally, and most importantly, it is well settled that a claim for compensatory or consequential damages does not fall under the purview of 'other equitable relief' available to an ERISA plan participant or beneficiary under Section 1132(a)(3)."). *See Mertens v. Hewitt Assocs., 508 U.S. 248*, 255–58, 261 (1993) (finding that equitable relief does not include compensatory damages under ERISA § 1132(a)(3)). *See also* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140–44 (1985) (finding that ERISA also authorizes a plan participant or beneficiary to seek appropriate relief under 29 U.S.C. § 1109(a) pertaining to a breach of fiduciary duty, but any extra-contractual damages recovered pursuant to that provision inure to the plan itself rather than to the individual beneficiary); *supra* Part B–B.1 (explaining the failure of the Plan Terms Provision and Plan Recovery Provision to provide adequate remedies for wrongful denial of benefits under ERISA).

[74] Muir, *supra* note 5, at 655 ("The Plan Terms Provision did not provide for any recovery because it can only require payment of benefits. Health care treatment was no longer of value to the deceased. Nor would the deceased individual's heirs be helped by seeking a recovery to the health care plan under the Plan Recovery Provision." (citing *Andrews-Clarke*, 984 F. Supp. at 52)).

[75] *Andrews-Clarke*, 984 F. Supp. at 53–55 ("All of Diane Andrews-Clarke's cognizable state law causes of action arise out of the alleged improper

Such a perverse outcome under ERISA in *Andrew-Clarke* is not atypical.[76] In fact, it is quite common.[77] However, these outcomes are not entirely the Supreme Court's fault.[78] Due to a shift in the healthcare industry more generally, many individuals are subject to benefit plans that may not properly incentivize administering healthcare, thereby increasing the wrongful denials that ultimately result in these claims.[79]

F. Changes in the Healthcare Industry

The current dominance of "managed care" plans in the healthcare industry may also have contributed to this perception of inadequate remedies under ERISA.[80] Managed care plans have contracts with health care providers and medical facilities to provide care for members at lower costs.[81] These cost-saving providers make up the plan's network, thereby restricting accessible health care to the network and its rules.[82] Compared to the traditional fee-for-service system that they replaced, managed care plans provide the opposite incentive for health care providers, as they provide as little health care as possible.[83] Indeed, a burgeoning body of proof has indicated that managed care plans lead to the denial of even life-saving healthcare in

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processing of Clarke's claim for benefits under an ERISA employee benefit plan, and are therefore preempted.").

[76] *Id.* at 60 ("Perhaps even more disturbing than the perverse outcome generated by ERISA in this particular case is the fact that, in the current health care system, the misconduct alleged by Diane Andres-Clarke may not be atypical.").

[77] *See* Stris, *supra* note 20, at 395 (citing, among other cases, Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1010 (9th Cir. 1998); Cannon v. Group Health Serv. of Okla., Inc., 77 F.3d 1270, 1277 (10th Cir. 1996)).

[78] Stris, *supra* note 20, at 396.

[79] *See supra* notes 80–84 and accompanying text (discussing the issues associated with shifting healthcare industry practices and the rise of managed care plans).

[80] *Andrews-Clarke*, 984 F. Supp. 49 at 60.

[81] *Managed Care,* MEDLINEPLUS, https://medlineplus.gov/managedcare.h**tml [**https://perma.cc/6946-JH76] (last visited Mar. 5, 2019).

[82] *Id.*

[83] *See* Thomas W. Malone & Deborah Haas Thaler, *Managed Health Care: A Plaintiff's Perspective* 32 TORT & INS. L.J. 123, 153 (1996).

the name of cutting costs.[84] For example, scholars have noted that a great number of these claims surround whether the "treatment is medically necessary."[85] Another notable source of disputes is the "significant amount of litigating regarding treatments that insurers have characterized as experimental and therefore not reimbursable."[86] Lastly, the question of whether the condition is one that arose before the plan's coverage—rendering it excluded from coverage under many plans—is another issue that is "litigated with some frequency."[87]

G. Conclusion

As a result of these perverse outcomes, many scholars and judges are calling for a reexamination of this area of law in order to provide adequate remedies for statutory violations in benefits cases under ERISA.[88] Some of these include calls for Congress to take affirmative steps to reform the remedies available under ERISA.[89] Others place blame on the Court's broad interpretation of both the civil enforcement provision under ERISA, and the Court's narrow interpretation of available remedies.[90] Some place a portion of the blame on changes in healthcare industry more generally.[91] Still others regard these disputes as inevitable consequences of such broad coverage of "well over 100 million Americans against a broad range of perils [which] will

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[84] *See, e.g., Andrews-Clarke*, 984 F. Supp. at 60 ("Indeed, there is a growing body of anecdotal evidence that managed health care plans often deny necessary, and even life-threatening medical treatment in the name of cutting costs."); Muir, *supra* note 5, at 616 (citing Kent G. Rutter, *Democratizing HMO Regulation to Enforce the Rule of Rescue, 30 U. MICH. J. L. REFORM 147, 147–49*)).

[85] *See* Stris, *supra* note 20, at 392 (citing JAYNE E. ZANGLEIN & SUSAN J. STABILE, ERISA LITIGATION 542 (2d ed. 2005)).

[86] *Id*.

[87] *Id.*

[88] *Andrews-Clarke*, 984 F. Supp. at 65. *See* Medill, *supra* note 45, at 941–42. *See* Muir, *supra* note 5, at 601 (citing among others Colleen E. Medill & Alyssa M. Stokes, *ERISA Subrogation After* Montanile, 95 NEB. L. REV. 603, 645–47 (2017); Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L. J. 131, 135 (2009)).

[89] Muir, *supra* note 5, at 601.

[90] *Id*.

[91] *See supra* notes 38–42 and accompanying text (discussing the issues associated with shifting healthcare industry practices and the rise of managed care plans).

necessarily result in many disagreements regarding the scope of coverage."[92] In addition to these calls, the Supreme Court itself appears to be pivoting away from its decision in *Mertens*.[93] Although not everyone is participating in these calls, given the current climate, the time is ripe for change in this area.[94]

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[92] *See* Stris, *supra* note 20, at 392, n. 26.
[93] Muir, *supra* note 5, at 630. *See* Sereboff v. Mid Atl. Med. Servs., 547 U.S. 356, 369 (2006).
[94] *See* Muir, *supra* note 5, at 608.
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