Note

Embracing Equity: A New Remedy for Wrongful Health Insurance Denials

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Carmine Cicio was diagnosed with blood cancer in March 1997.[1] His doctor tried chemotherapy first, but then decided that a blood stem cell transplant was the most appropriate treatment.[2] The procedure was well-established, with better response rates than other treatments, and Mr. Cicio was a good candidate.[3] However, the doctor needed the approval of Mr. Cicio's insurer before beginning the treatment.[4] Although the insurer's medical director had never seen Mr. Cicio, he nevertheless determined the stem cell transplant was not a suitable treatment for him.[5] Mr. Cicio's doctor spent months trying to convince the insurance company to reverse its decision.[6] Finally, the medical director relented and admitted that the treatment was right for Mr. Cicio.[7] By then, however, it was too late. Mr. Cicio died in May 1998.[8]

Mr. Cicio's wife sued the insurance company and its medical director for multiple claims, including medical malpractice.[9] The insurance company argued Ms. Cicio's claims were pre-

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1. Cicio v. Does, 321 F.3d 83, 86–87 (2d Cir. 2003), *vacated sub nom.* Vytra Healthcare v. Cicio, 542 U.S. 933 (2004) (mem.).
2. *Id.* at 87–88.
3. *Id.*
4. *Id.* at 88.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

empted by the federal Employee Retirement Income Security Act (ERISA),[10] which governs the administration of employee benefit plans and provides remedies for violations.[11] The U.S. Supreme Court ultimately agreed with the insurer and remanded Ms. Cicio's claims for reconsideration.[12]

The Court reached this result after holding in *Aetna Health Inc. v. Davila*[13] that claims against ERISA health insurers for denial of benefits are preempted by ERISA, which has its own "comprehensive remedial scheme."[14] So why is it that Ms. Cicio, like the plaintiffs in *Davila*, did not amend her complaint to take advantage of these ERISA remedies? It turns out that courts and commentators—and plaintiffs' lawyers—are nearly unanimous in declaring there is no remedy for plaintiffs like Ms. Cicio after *Davila*. As explained in Part I.C, this common view holds that patients harmed by wrongful denials of health insurance simply have no way of pursuing compensation for their losses. Most commentators conclude that this situation will continue until the Court overturns its precedents or Congress amends ERISA.

However, such patients may not need to look to Congress for a solution. The Supreme Court will still allow relief under ERISA if both the basis for the claim and the category of remedy were historically available in equity. Because of these demanding requirements, the Court will likely reject most proposed remedies for providing compensation under ERISA, such as restitution, reinstatement, and make-whole relief for breach of fiduciary duty.

Plaintiffs may find acceptable ERISA remedies, though, by embracing the Court's command to examine the practice of historical courts of equity. Surcharge is a remedy historically granted by courts of equity for breaches of fiduciary duty.[15] It requires the fiduciary to compensate the victim for costs incurred, income lost, and gains foregone because of the breach.[16]

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10. *See id.* at 89.

11. 29 U.S.C. § 1132 (2000).

12. Vytra Healthcare v. Cicio, 542 U.S. 933 (2004) (mem.).

13. 542 U.S. 200 (2004).

14. *Id.* at 217.

15. *See* 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, 1352 (2003).

16. RESTATEMENT (THIRD) OF TRUSTS § 205, cmt. a (1992); *see id.* §§ 210, 211; *see also* F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d

This Note argues that surcharge for breach of fiduciary duty fulfills the Court's requirements for "equitable relief" under ERISA and meets the objections the Court has raised to other forms of compensatory relief.[17]

Part I of this Note describes ERISA remedies and the Supreme Court decisions that have constrained those remedies. Part II argues that the Court has defined a two-part test for equitable relief under ERISA and proposes that surcharge for breach of fiduciary duty satisfies the Court's test for equitable relief, while other alternatives for providing monetary make-whole relief under ERISA do not. This Note concludes that surcharge for breach of fiduciary duty may provide a last chance at compensation for victims of wrongful healthcare denials.

I. THE CURRENT LANDSCAPE: LIMITED ERISA REMEDIES PLUS TOTAL ERISA PREEMPTION CREATE A REGULATORY VACUUM

ERISA provides three main remedies for employees with complaints about their employer-provided benefits.[18] Of these, the remedy offering equitable relief for beneficiaries provides the greatest potential for relief to victims of wrongful health insurance denials.[19] However, the Court has narrowly construed equitable relief to exclude most, if not all consequential damages.[20] Moreover, patients cannot sue under common law or state law causes of action because the Court has ruled that ERISA preempts such claims.[21] As a result, a "regulatory vac-

1128, 1142 (9th Cir. 2001).

17. The idea of surcharge as an ERISA remedy derives from Professor Langbein; he argued that Justice Scalia was wrong in *Mertens* to assert that damages were always a legal remedy and explained that Scalia may have been confused because awards of compensatory relief in courts of equity were commonly called "surcharge" instead of "damages." Langbein, *supra* note 15, at 1352–53. However, Langbein never argues that the Court would accept surcharge as an ERISA remedy. Instead, he argues that surcharge is simply a synonym for damages. *Id.* If this were true, then as explained in Part II.A.1, the Court would reject surcharge as an ERISA remedy because allowing it would deprive the word "equitable" in ERISA of any limiting meaning. In contrast, this Note argues that surcharge is a distinctly equitable remedy, clearly distinguished from legal damages, and that therefore it meets the Court's requirements for an ERISA remedy.

18. *See* 29 U.S.C. § 1132(a) (2000).

19. *See id.* § 1132(a)(3).

20. *See, e.g.*, Aetna Health Inc. v. Davila, 542 U.S. 200, 204–21 (2004); *see also id.* at 222–24 (Ginsburg, J., concurring).

21. *See id.* at 222–24.

uum" exists in which plaintiffs like Ms. Cicio have little opportunity for relief.[22]

A. REMEDIES PROVIDED BY ERISA

Congress enacted ERISA in 1974 in response to a widely publicized pension fund failure that left workers without funds for retirement.[23] With ERISA, Congress created a comprehensive scheme of federal regulation of employee pension plans, intending to protect workers from the risk of default or misadministration of their retirement plans.[24] ERISA not only covers pension plans, but also all employee benefit plans including welfare benefit plans such as health insurance.[25]

ERISA draws from the law of trusts and "treats anyone as a fiduciary to the extent that person exercises material discretion over the [employee benefit] plan."[26] ERISA also requires that all such fiduciaries fulfill certain duties.[27] Among its mandates, ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . [and] defraying reasonable expenses of administering the plan."[28]

A beneficiary may pursue three types of civil remedies for fiduciary violations of the Act's requirements. First, a beneficiary may use an ERISA reimbursement action to sue to recover benefits due or to enforce or clarify his or her rights under the plan.[29] This provision does not provide for compensating any harm the beneficiary may have incurred as a consequence of the benefit denial—it is limited to paying the benefits originally denied.[30] Second, ERISA allows a suit for "appropriate relief" for breach of fiduciary duty.[31] Third, a beneficiary may also sue

22. *Id.* at 222.

23. *See* Langbein, *supra* note 15, at 1321–22.

24. *Id.* at 1322.

25. James W. Kim, Note, *Managed Care Liability, ERISA Preemption, and State 'Right to Sue' Legislation in* Aetna Health, Inc. v. Davila, 36 LOY. U. CHI. L.J. 651, 655 (2005).

26. *See* Langbein, *supra* note 15, at 1324–25.

27. *See id.*

28. 29 U.S.C. § 1104(a) (2000).

29. *Id.* § 1132(a)(1)(B).

30. *See id.*

31. *Id.* §§ 1132(a)(2), 1109.

to obtain "other appropriate equitable relief."[32] The Supreme Court could have construed the latter two remedies to allow compensation for harm suffered by beneficiaries like Ms. Cicio. Instead, in a series of decisions, the Court narrowly interpreted these two provisions to strictly limit remedies for individuals against the plan.

B. Limits on ERISA Remedies

The Supreme Court has limited the ERISA provisions for appropriate relief for breach of fiduciary duty and for other appropriate equitable relief through three decisions. In *Massachusetts Mutual Life Insurance Co. v. Russell*, the Court ruled that a suit for appropriate relief for breach of fiduciary duty under ERISA authorizes payment of damages for a breach of fiduciary duty only to the plan, not to the participant.[33] Thus, a plaintiff like Ms. Cicio cannot receive any compensation as appropriate relief under this provision. The Court also held that this provision did not authorize compensatory or punitive damages, characterizing those damages as "extracontractual."[34] However, the Court explicitly left open the possibility that it might authorize such damages under a separate provision providing for other appropriate equitable relief.[35]

Eight years later the Court appeared to foreclose this possibility in *Mertens v. Hewitt Associates*.[36] In *Mertens*, the plaintiffs sought compensation for the actions of a pension plan that resulted in beneficiaries receiving reduced benefits.[37] The beneficiaries sued under ERISA's provision for other appropriate equitable relief.[38] In writing for the 5–4 majority, Justice Scalia held that the relief sought was not available because equitable relief in the statute includes only relief "typically" available in courts of equity before the merger of courts of law and equity.[39] Scalia mentioned three categories of remedies that would qualify as equitable relief: injunctions, mandamus, and restitu-

32. *Id.* § 1132(a)(3).
33. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985).
34. *Id.* at 144.
35. *Id.* at 139.
36. 508 U.S. 248 (1993).
37. *Id.* at 251.
38. *Id.* at 253.
39. *Id.* at 256.

tion.[40] He specifically held that compensatory damages are not an equitable remedy.[41]

Almost a decade later, the Court clarified its standard for equitable relief in *Great-West Life & Annuity Insurance Co. v. Knudson*.[42] In *Great-West*, an insurer sought restitution for payments to a beneficiary after that beneficiary obtained a judgment against a third party.[43] To determine what constitutes equitable relief, Scalia, writing again for a 5–4 majority, examined the types of remedies available in courts of equity before the merger of equity and law.[44] Under this revised test, the Court examined "standard current works such as Dobbs, Palmer, Corbin, and the Restatements" to determine whether the requested relief was "typically available in equity."[45] Scalia found that an action for restitution was only equitable if the plaintiff sought money or property that could "clearly be traced to particular funds or property in the defendant's possession."[46] Thus, restitution that imposes liability is legal, while restitution that seeks to restore particular property is equitable.[47] Importantly, the Court limited this distinction to actions seeking restitution.[48]

These three decisions have almost completely foreclosed compensatory relief for beneficiaries under ERISA. *Russell* precluded compensation for beneficiaries in suits for appropriate relief for breach of fiduciary duty under ERISA.[49] *Mertens* and *Great-West* then excluded compensatory damages in suits for other appropriate equitable relief and limited such relief to categories of relief typically available in equity.[50]

This unavailability of compensatory damages makes ERISA remedies "almost entirely illusory" for victims of wrongful healthcare denials.[51] The Court recommends that patients

40. *Id.*
41. *Id.*
42. 534 U.S. 204 (2002).
43. *Id.* at 208.
44. *Id.* at 212.
45. *Id.* at 217.
46. *Id.* at 213.
47. *See id.*
48. *See id.* Indeed, the Court distinguished *Mertens*, which involved an action for damages for breach of fiduciary duty, as opposed to restitution. *Id.* at 215.
49. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985).
50. *See, e.g.*, Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993).
51. DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 459 (3d Cir. 2003)

"pa[y] for the treatment themselves and then [seek] reimbursement through [an ERISA § 1132(a)(1)(B) reimbursement action], or [seek] a preliminary injunction."[52] But injunctive relief is only practical if the patient can delay treatment until the resolution of the lawsuit. Reimbursement similarly provides no relief for patients like Mr. Cicio who forgo treatment that is too expensive to pay out-of-pocket. Even if a patient can wait for an injunction or pay the high price of treatment, without the possibility of contingency fees, the plaintiff would have to pay for the lawsuit.[53] As one court remarked, "Enacted to safeguard the interests of employees and their beneficiaries, ERISA has evolved into a shield of immunity that protects health insurers . . . and other managed care entities from potential liability for the consequences of their wrongful denial of health benefits."[54]

Thus, beneficiaries like Ms. Cicio are effectively without relief from ERISA. In theory, this absence of federal remedies still would not bar a suit by Ms. Cicio under state statutes or the common law. Unfortunately, the Court has also cut off those avenues of relief.

C. The Court Eliminated Non-ERISA Remedies

In addition to limiting ERISA remedies, the Court expanded ERISA's preemptive force to preclude almost all other avenues for relief. This has resulted in what Justice Ginsburg has termed a "regulatory vacuum,"[55] where "[v]irtually all state law remedies are preempted but very few federal substitutes are provided."[56] In *Aetna Health Inc. v. Davila*, a unanimous Court held that ERISA completely preempts state law actions brought to remedy the denial of benefits under ERISA health plans.[57] Not only state patients' rights statutes, such as the one relied upon by the *Davila* plaintiffs, but also common law actions including breach of contract, wrongful death, and mal-

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(Becker, J., concurring).

52. Aetna Health Inc. v. Davila, 542 U.S. 200, 211 (2004).

53. *DiFelice*, 346 F.3d at 459 (Becker, J., concurring). Indeed, Becker argues that the current system provides strong financial incentives for health plans to cheat their customers with impunity. *Id.*

54. Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 53 (D. Mass. 1997).

55. *Davila*, 542 U.S. at 222 (Ginsburg, J., concurring).

56. *Id.* (quoting *DiFelice*, 346 F.3d at 456 (Becker, J., concurring)).

57. *Id.* at 213–14 (majority opinion).

practice are now unavailable to injured plaintiffs.[58] For instance, Ms. Cicio could not sue her insurer for breaching its contract to pay for care for her husband; nor could she sue her insurer for breaching its common law duty of care in negligence or malpractice; nor could she sue under any state statute—ERISA preempts all such remedies.[59]

Ginsburg urged Congress to amend ERISA to fill this vacuum, but she also pointed to another possible approach to obtaining "make-whole" relief for beneficiaries.[60] She suggested that since *Mertens*'s limitations on consequential damages dealt only with *non*fiduciaries, ERISA, "as currently written and interpreted," might allow "'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench."[61]

Numerous courts and commentators echo Ginsburg's call for congressional action to fill this "gaping wound" and provide some remedy for wrongful health insurance benefit denials.[62]

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58. One judge notes that breach of contract predates the Magna Carta, has been strictly enforced by courts since then until preempted by ERISA, and is the "very bedrock of our notion of individual autonomy and property rights . . . . Our entire capitalist structure depends on it." *Andrews-Clarke*, 984 F. Supp. at 52–53.

59. In contrast, ERISA does not preclude a medical malpractice claim against a medical provider, or a mixed treatment and coverage claim against a plan that employs a treating physician, but does preclude claims against insurers for benefit decisions. *See* Pegram v. Herdrich, 530 U.S. 211, 237 (2000).

60. *Davila*, 542 U.S. at 223 (Ginsburg, J., concurring).

61. *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 27–28 n.13, Aetna Health Inc. v. Davila, 542 U.S. 200 (2004) (No. 02-1845), 2004 WL 121584).

62. Cicio v. Does, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting) (referring to the majority opinion as an "injury that the courts have done to ERISA [that] will not be healed until the Supreme Court reconsiders the existence of consequential damages under the statute, or Congress revisits the law to the same end"), *vacated sub nom.* Vytra Healthcare v. Cicio, 542 U.S. 933 (2004) (mem.); *see, e.g.*, DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring) (urging that "Congress and the Supreme Court revisit what is an unjust and increasingly tangled ERISA regime"); *Andrews-Clarke*, 984 F. Supp. at 53 ("This case, thus, becomes yet another illustration of the glaring need for Congress to amend ERISA to account for the changing realities of the modern health care system."); Kim, *supra* note 25, at 701–02 (calling for a federal Patients' Bill of Rights in response to *Davila*); Linda Peeno et al., *A Wrong Without a Remedy*, TRIAL, Sept. 2005, at 60, 67 ("After *Davila*, consumer advocates, health care analysts, and even federal judges are looking to Congress to correct the disparity of rights—either through elimination or overhaul of ERISA's effects.").

Many also call for the Supreme Court to overrule *Mertens*'s limitations on "appropriate equitable relief."[63] Indeed, many conclude the Court now limits monetary relief for wrongful healthcare denials to payment for benefits due.[64] However, these commentators have ignored the possibility raised in Ginsburg's *Davila* concurrence: these patients may be able to obtain meaningful relief *without* overruling previous Supreme Court precedent and *without* congressional action.

II. FINDING MAKE-WHOLE RELIEF IN THE VACUUM BY EMBRACING EQUITABLE REMEDIES AND CLAIMS

The surcharge remedy, coupled with a claim for breach of fiduciary duty, may offer relief under ERISA for some of the harm caused by the wrongful denial of medical care. The current Supreme Court test for equitable relief under ERISA is satisfied only if the cause of action and the category of remedy were typically available in courts of equity. A plaintiff can meet both prongs of this test by requesting the remedy of surcharge for a claim of breach of fiduciary duty. Although surcharge may seem like an obsolete historical remedy, such a remedy is precisely what the Court requires in declaring that it intends to revive the "obsolete distinction" between equity and law.[65] Indeed, unlike other proposals for make-whole relief under ERISA, surcharge is clearly distinguished from historically legal damages and gives the Court exactly what it demands: a remedy that undeniably conforms to the "ancient classification" of equitable relief.[66]

A. THE TEST FOR EQUITABLE RELIEF IN ERISA

The Supreme Court has defined two prongs of the test for equitable relief under ERISA. First, the plaintiffs must seek a remedy typically granted by courts of equity.[67] Second, they must bring a claim that could have been brought in courts of

63. *See, e.g.,* Langbein, *supra* note 15, at 1364; *DiFelice*, 346 F.3d at 453; *Cicio*, 321 F.3d at 106 (Calabresi, J., dissenting).

64. *See, e.g.*, Kim, *supra* note 25, at 652–53 (claiming that relief now is limited to the cost of the health services denied); Peeno, *supra* note 62, at 62.

65. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 216–17 (2002).

66. *Id.*

67. Mertens v. Hewitt Assocs., 508 U.S. 248, 257 (1993).

equity.[68] Monetary relief is still available as long as it satisfies the two prongs of this test.

1. *Mertens* Requires a Historically Equitable Category of Remedy

The Court laid out the "remedy" prong of its test in *Mertens*, holding that relief is only equitable for purposes of ERISA if it is one of the "categories of relief that were *typically* available in equity," as distinguished from legal relief sometimes available in equitable actions.[69] For instance, in *Mertens*, Scalia, writing for the majority, acknowledged that because ERISA is rooted in the law of trusts, equitable relief *could* mean all relief available for breach of trust in courts of equity.[70] However, he reasoned that such an interpretation must be wrong because it would rob the phrase "equitable relief" of any limiting meaning—allowing any type of relief.[71] Instead, he defined the phrase to refer to "categories of relief *typically* available in equity."[72] Thus, the focus of the *Mertens* test is on the category of *remedy* as distinguished from the type of *claim*. Just because a claim could have been brought in a court of equity does not make any relief granted for that claim equitable relief.[73]

In *Great-West*, Scalia reiterated this point in rejecting an argument that "the common law of trusts provides petitioners with equitable remedies that allow them to bring this action under [ERISA]" because "a trustee could bring a [similar suit in equity]."[74] He cited *Mertens* to reemphasize that the *category of remedy* must be equitable, regardless of whether courts of equity would have entertained a similar action.[75]

68. *Great-West*, 534 U.S. at 215 (quoting Reich v. Continental Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994)).

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

70. *Id.* at 257.

71. *Id.*

72. *Id.* at 256.

73. *Id.* at 256–57.

74. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 219 (2002).

75. *Id.* Professor Langbein argues that the Court's limitations on equitable relief adhere neither to the historical understanding of the term nor to Congress's intent in using the term in ERISA. Langbein, *supra* note 15, at 1328–31. He refers to Scalia's argument as "internally incoherent." *Id.* at 1352. He argues that Congress intended to include the full range of trust remedies in ERISA. *Id.* at 1319, 1331. However, as explained in this Part, the

In order to prove that a remedy is historically equitable, plaintiffs must show that it is clearly distinguished from legal remedies. In *Mertens*, Scalia argued that the remedy requested by the petitioners, although characterized as equitable, was in reality nothing other than a claim for compensatory damages—a legal, not equitable remedy.[76] The dissent argued the term equitable relief still restricted the scope of remedies, even if it embraced compensatory relief, because it excluded punitive damages, which were unavailable in equity.[77] Scalia responded that punitive damages *were* sometimes available in courts of equity. Thus, according to him, if courts defined "equitable relief" as "all relief available in courts of equity," that definition would include punitive damages and would not limit equitable relief at all.[78] Therefore, in the Court's scheme, only remedies which provide something less than legal damages are truly distinguished from legal damages and qualify as equitable.

2. *Great-West* Requires a Typically Equitable Basis for the Claim

The second prong of the test for equitable relief under ERISA examines the basis for the claim. In *Great-West*, Scalia emphasized that a remedy is only equitable for purposes of ERISA if it is "*commonly* ordered in equity cases" and excludes remedies only "*occasionally* awarded in equity cases."[79] Ginsburg's dissent focuses only on the *Mertens* prong, characterizing the test as a question only of the "substance of the relief requested."[80] In response, Scalia argues that it is not only a question of the substance of the relief, but also the "basis for [the] claim" that is important.[81] For example, Scalia explains that an equity court would never grant "an injunction against [a] failure to pay a simple indebtedness."[82] The sources he cites for

standard in these cases is internally consistent if understood as examining both the category of remedy and the type of action to narrowly define the term "equitable remedy."

76. *Mertens*, 508 U.S. at 255.

77. *Id.* at 270 (White, J., dissenting).

78. *Id.* at 259 n.7 (majority opinion).

79. *Great-West*, 534 U.S. at 215 (quoting Reich v. Continental Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994)) (first emphasis added).

80. *Id.* at 228 (Ginsburg, J., dissenting).

81. *Id.* at 213 (majority opinion).

82. *Id.* at 216; *see also id.* at 210–11.

this proposition[83] explain that a court of equity would not grant such an injunction because it would not have jurisdiction over the case.[84] Thus the question is one of equitable jurisdiction over the case, rather than type of remedy.

Although *Great-West* considered the type of claim, it did not abandon the test for an equitable category of remedy.[85] The Court now requires both prongs for equitable relief under ERISA. As Scalia noted, this is similar to the test courts use to determine the meaning of "equitable" for purposes of the Seventh Amendment's right to jury trial "[i]n suits at common law,"[86] as opposed to suits at equity.[87] In such cases, the Supreme Court also applies a two-prong test: "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity . . . . Second, we examine the remedy sought and determine whether it is legal or equitable in nature."[88] Indeed, in *Great-West*, Scalia affirmed that the inquiry for determining equitable relief under ERISA should be similar to that used in Seventh Amendment contexts.[89]

3. Monetary Relief Not Precluded

The *Mertens* Court held the relief claimed was not equitable in part because "[m]oney damages are, of course, the classic form of *legal* relief."[90] The Court reiterated this point in *Great-West*, stating that "[a]lmost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty."[91] Many courts and commentators read this passage to preclude

83. *Id.* at 210–11.
84. RESTATEMENT (SECOND) OF CONTRACTS § 359 cmt. a (1981) (explaining that the availability of equitable injunctive relief for failure to perform a contractual duty was historically viewed as a matter of jurisdiction, determined by the adequacy of legal damages).
85. *Great-West*, 534 U.S. at 219.
86. *Id.* at 217 (citing Curtis v. Loether, 415 U.S. 189, 192 (1974)).
87. Tull v. United States, 481 U.S. 412, 417 (1987).
88. *Id.* at 417–18.
89. *Great-West*, 534 U.S. at 217.
90. Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).
91. *Great-West*, 534 U.S. at 210.

monetary claims from equitable relief under ERISA.[92]

However, courts routinely award monetary relief under ERISA's other appropriate equitable relief provision while avoiding characterizing such awards as "damages." For instance, plaintiffs commonly win past due monetary benefits under this section.[93] Courts often award interest on those past due benefits[94] and have sometimes awarded attorneys fees under this same provision.[95] As the Tenth Circuit reasons, "[a]fter all, any equitable relief, including those forms explicated by the Court as available under [this section], must involve the direct or indirect transfer of money."[96] Indeed, *Mertens* explicitly authorizes monetary relief, at least in the form of restitution.[97]

4. Equitable Relief under ERISA Is Not Limited to Injunctions, Mandamus, and Restitution

In *Mertens*, Justice Scalia declares that equitable relief as used in ERISA refers to "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[98] From this, some have concluded the Court will *only* allow injunction, mandamus, and restitution as equitable relief.[99] Professor

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92. *See, e.g.*, DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 459 (3d Cir. 2003) (declaring that *Mertens* limited relief to "injunctions, mandamus, and restitution, but not monetary damages"); Kuhl v. Lincoln Nat'l Health Plan of Kan. City, 999 F.2d 298, 304–05 (8th Cir. 1993) (excluding a claim for relief because it involves monetary relief); Hartman v. Wilkes-Barre Gen. Hosp., 237 F. Supp. 2d 552, 557 (M.D. Pa. 2002) (interpreting *Great-West* to preclude any claims for "money due and owing"); Langbein, *supra* note 15, at 1350; Kelly M. Loud, Comment, *ERISA Preemption and Patients' Rights in the Wake of* Aetna Health Inc. v. Davila, 54 CATH. U. L. REV. 1039, 1067 (2005).

93. *See, e.g.*, Admin. Comm. of the Wal-Mart Assocs. Health and Welfare Plan v. Willard, 393 F.3d 1119, 1125 (10th Cir. 2004); Howe v. Varity Corp., 36 F.3d 746, 756 (8th Cir. 1994), *aff'd*, 516 U.S. 489 (1996).

94. *See, e.g.*, Skretvedt v. E.I. DuPont de Nemours, 372 F.3d 193, 196 (3d Cir. 2004) (reaffirming that interest is available as an equitable remedy under § 502(a)(3) after *Great-West*); Dunnigan v. Metropolitan Life Ins. Co., 277 F.3d 223, 253 (2d Cir. 2002); Clair v. Harris Trust & Savs. Bank, 190 F.3d 495, 498–99 (7th Cir. 1999); Fotta v. Trs. of the United Mine Workers, 165 F.3d 209, 213 (3d Cir.1998).

95. *See, e.g.*, Gorman v. Carpenters' & Millwrights' Health Benefit Trust Fund, 410 F.3d 1194, 1201 (10th Cir. 2005).

96. *Admin. Comm. of the Wal-Mart Assocs. Health and Welfare Plan*, 393 F.3d at 1125.

97. Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993).

98. *Id.*

99. *See, e.g.*, DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 459 (3d Cir.

Langbein goes further, explaining that mandamus was not historically equitable, that injunction is explicitly allowed in ERISA separately from equitable relief, and that *Great-West* allows restitution only when there is a constructive trust. Therefore, he concludes, the *only* equitable relief now allowed under ERISA is that available through a constructive trust.[100] However, the plain words of the *Mertens* opinion do not support this constrictive reading. If Scalia had meant to limit relief to *only* those three categories, he is unlikely to have authorized "categories of relief . . . *such as* injunction, mandamus, and restitution."[101] Indeed, lower courts have awarded other categories of relief since *Great-West*.[102]

Thus, for a plaintiff like Ms. Cicio to receive compensation for the losses caused by the insurer, she must sue for equitable relief under ERISA because the Act preempts all other forms of relief and because other ERISA remedies do not offer compensatory relief. The Supreme Court will only accept her suit if the basis of her claim is historically equitable and if she requests a remedy that was typically available in courts of equity. She can request a monetary remedy, and her choice of remedy is not limited to injunction, mandamus and restitution. The key remaining issue is whether such a remedy, which can provide compensation for her loss, exists.

B. OTHER PROPOSALS DO NOT MEET THE COURT'S DEFINITION OF EQUITABLE RELIEF

Lower courts and commentators have proposed solutions for awarding relief for consequential harms under ERISA by characterizing the relief in equitable terms such as restitution, reinstatement, or make-whole equitable relief. As explained be-

2003) (declaring that *Mertens* limited relief to "injunctions, mandamus, and restitution, but not monetary damages"); Langbein, *supra* note 15, at 1351–53, 1360.

100. Langbein, *supra* note 15, at 1360. Langbein uses this analysis to show the absurdity of the limitations the Court has placed on the definition of "equitable remedies," and the likelihood that such limitations were not intended by Congress. *Id.*

101. *Mertens*, 508 U.S. at 256 (emphasis added).

102. *See, e.g.,* Mathews v. Chevron Corp., 362 F.3d 1172, 1186 (9th Cir. 2004) (awarding make-whole relief as "reinstatement"); Dunnigan v. Metro. Life Ins. Co., 277 F.3d 223, 253 (2d Cir. 2002) (awarding interest as make-whole equitable relief); Clair v. Harris Trust & Savs. Bank, 190 F.3d 495, 498–99 (7th Cir. 1999) (same); Fotta v. Trs. of the United Mine Workers, 165 F.3d 209, 213 (3d Cir. 1998) (same).

low, such solutions are unlikely to meet current Supreme Court requirements for equitable relief under ERISA because the Court demands that the relief be equitable in substance, not merely in name. In contrast, surcharge for breach of fiduciary duty is substantively distinct from legal damages and is the best chance for make-whole relief for beneficiaries harmed by ERISA plan violations.

1. Restitution Fails the Category of Remedy Test in Suits for Wrongful Benefit Denial

Some courts have granted relief beyond mere benefits due as restitution. For example, the Seventh Circuit has awarded restitution of medical costs as relief for breach of fiduciary duty against a health insurance plan that wrongfully denied coverage.[103] Similarly, the Eighth Circuit in *Howe v. Varity* called it "equitable restitution" when it awarded reinstatement into a benefits plan and the payment of lost benefits.[104] However, this theory of relief is unlikely to qualify as equitable relief under ERISA after *Great-West* because it does not satisfy the remedy prong of the test. *Great-West* held that restitution is not a historically equitable category of relief unless "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[105] Therefore, awards of reinstatement into a benefit plan, costs incurred due to a breach of fiduciary duty, or even benefits foregone as the result of such a breach are not historically equitable restitution because they do not seek to recover funds in the plan's possession. The Second Circuit reached the same conclusion in determining that restitution of medical costs such as that awarded by the Seventh Circuit is not equitable relief in light of *Great-West*.[106]

103. Bowerman v. Wal-Mart Stores, 226 F.3d 574, 592 (7th Cir. 2000).

104. Howe v. Varity Corp., 36 F.3d 746, 756–57 (8th Cir. 1994), *aff'd*, 516 U.S. 489 (1996). The Supreme Court affirmed *Varity* but did not discuss the remedies issue. Varity Corp. v. Howe, 516 U.S. 489, 495 (1996).

105. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002); *see also* David D. Leishman, Note, *Adding Insult to Injury: ERISA,* Knudson*, and the Error of the Possession Theory*, 89 MINN. L. REV. 1214, 1231–32 (2005).

106. Pereira v. Farace, 413 F.3d 330, 339–40 (2d Cir. 2005). The Seventh Circuit in *Bowerman* relied partially on *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999). *Bowerman*, 226 F.3d at 592. *Strom* was abrogated by the Second Circuit in *Pereira*, because the Second Circuit recognized that restitution was only equitable after *Great-West* if it involved funds in the defen-

The Tenth Circuit also applied this reasoning in refusing to award a plaintiff the benefits she lost because of an ERISA life insurance plan's breach of duty.[107] The court explained the beneficiary could claim restitution for the amounts she had paid in plan premiums, which would be directly traceable to her, but not for the insurance benefit she would have received absent the breach of duty.[108]

In the case of a health insurance denial, a court is also likely to reject a claim for restitution of direct or consequential losses. Like the life insurance beneficiary, a health insurance beneficiary might seek benefits due under the plan. Even if the beneficiary paid for health care out-of-pocket, those payments would not be made to the plan, and so no funds possessed by the plan would be "directly traceable" to the beneficiary.[109] Courts have emphatically refused to grant restitution for profits derived through unjust enrichment when a health plan wrongly denies a procedure.[110] In a case like Ms. Cicio's, where a plaintiff forgoes care and seeks compensation for losses caused by the health care denial, there is not even a monetary expenditure for health care by the plaintiff for which to claim restitution.[111]

2. Reinstatement Fails the Category of Remedy Test

Courts have attempted to circumvent *Great-West's* apparent foreclosure of restitution for benefit denials by recasting the same type of award as reinstatement. This theory is also unlikely to satisfy the Supreme Court's requirements for equitable relief under ERISA. In *Mathews v. Chevron Corp.*, plan administrators convinced the plaintiffs to forgo an opportunity to participate in a pension plan.[112] The Ninth Circuit granted make-whole relief to the plaintiffs.[113] The relief—all the benefits the plaintiffs would have received had they enrolled in the

dant's possession. *Pereira*, 413 F.3d at 339–40.

107. Callery v. U.S. Life Ins. Co. in City of New York, 392 F.3d 401, 406 (10th Cir. 2004).

108. *Id.*

109. *See Great-West,* 534 U.S. at 213–14.

110. *See, e.g.*, Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1011 (9th Cir. 1998).

111. *Id.*

112. Mathews v. Chevron Corp., 362 F.3d 1172, 1177–78 (9th Cir. 2004).

113. *Id.*

plan from the start[114]—was identical to that granted in *Varity*.[115] But unlike in *Varity*, and perhaps in response to the limitations on restitution after *Great-West*, the Ninth Circuit went to great lengths to characterize the relief as "reinstatement" and did not mention the term "restitution."[116]

Furthermore, although the Ninth Circuit in a series of cases cites the Supreme Court in *Varity* for the proposition that reinstatement is "equitable, not compensatory relief,"[117] none of these cases cite any "standard current works"[118] as required by the *Great-West* test.[119] Moreover, the Ninth Circuit is incorrect to cite *Varity* for its assertion that such an award is equitable relief because this issue was not before the Supreme Court in *Varity*.[120] The Supreme Court simply relied on the lower court's remedy determination, which characterized the remedy as restitution, not as reinstatement.[121]

Thus, reinstatement does not pass the first prong of the test for equitable relief. Furthermore, even if it were an equitable remedy, it would be difficult to characterize make-whole relief for medical benefit denials as reinstatement. Unlike the defendants in *Mathews* and *Varity*, Ms. Cicio's benefit plan did not disenroll her, so she cannot be reinstated to the plan. Indeed, the Ninth Circuit explicitly distinguishes such claims from reinstatement.[122]

3. Equitable Relief for Breach of Fiduciary Duty Fails the Category of Remedy Test

The U.S. Department of Labor (DOL) has argued that ERISA allows make-whole equitable relief for breach of fiduciary duty, reasoning that any relief for breach of fiduciary duty

114. *Id.* at 1186.

115. Howe v. Varity Corp., 36 F.3d 746, 756 (8th Cir. 1994), *aff'd*, 516 U.S. 489 (1996).

116. *Mathews*, 362 F.3d at 1186–87.

117. McLeod v. Or. Lithoprint Inc., 102 F.3d 376, 379 (9th Cir. 1996).

118. *See Mathews*, 362 F.3d at 1186–87; Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1011 (9th Cir. 1998); FMC Med. Plan v. Owens, 122 F.3d 1258, 1261–62 (9th Cir. 1997); *McLeod*, 102 F.3d at 379.

119. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002).

120. Varity Corp. v. Howe, 516 U.S. 489, 515 (1996).

121. Howe v. Varity Corp., 36 F.3d 746, 756–57 (8th Cir. 1994), *aff'd*, 516 U.S. 489 (1996).

122. *See Bast*, 150 F.3d at 1011; *Owens*, 122 F.3d at 1261–62.

is inherently equitable.[123] Although no courts have adopted the DOL's approach to grant compensation for consequential losses, three Circuits have awarded interest on benefits paid after a delay that constituted a breach of fiduciary duty.[124] Courts in these cases have justified paying interest as equitable relief because it "make[s] the plaintiff whole."[125] In *Dunnigan v. Metropolitan Life Insurance*, the Second Circuit awarded interest on past due benefits, explicitly stating that make-whole relief is an appropriate equitable remedy for breach of fiduciary duty.[126] In that case, the court did not characterize the interest as restitution but only referred to it as an "equitable make-whole remedy" for the "unjust enrichment" of the defendants.[127]

This argument ignores the remedy prong of the test for equitable relief. The DOL argued that this test does not apply to actions against fiduciaries because *Mertens* involved an action against nonfiduciaries.[128] As the DOL notes, the Supreme Court initially stated the issue in *Mertens* as "whether a nonfiduciary who knowingly participates in the breach of a fiduciary duty imposed by . . . ERISA . . . is liable [to the plan] for . . . compensatory damages."[129] However, the Court based its holding not on the fiduciary status of the defendant but on the meaning of the term "equitable relief," concluding that it excluded compensatory damages regardless of whether they were sought against a fiduciary or nonfiduciary.[130] Furthermore,

123. *See generally* Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees and Plaintiffs-Cross-Appellants, Mathews v. Chevron, 362 F.3d 1172 (9th Cir. 2004) (Nos. 02-15936 & 02-16209), 2002 WL 32290814 [hereinafter Brief for the Secretary of Labor].

124. *See, e.g.*, Dunnigan v. Metro. Life Ins. Co., 277 F.3d 223, 253 (2d Cir. 2002); Clair v. Harris Trust & Savs. Bank, 190 F.3d 495, 498–99 (7th Cir. 1999); Fotta v. Trs. of the United Mine Workers, 165 F.3d 209, 213 (3d Cir. 1998).

125. *Dunnigan*, 277 F.3d at 229.

126. *Id.*

127. *Id.*

128. Brief for the Secretary of Labor, *supra* note 123, at 9–10.

129. *Id.* at 9 (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 249–50 (1993)) (emphasis omitted).

130. Mertens, 508 U.S. at 255–56; Langbein, *supra* note 15, at 1349–50. Langbein notes that "to the astonishment of the ERISA bar, the Supreme Court avoided deciding the question of nonfiduciary liability. The Court rested its decision on the ground that even if there were such liability, section 502(a)(3) did not authorize the plaintiffs to recover consequential damages for Hewitt's conduct." *Id.*; *see also* McLeod v. Or. Lithoprint Inc., 102 F.3d 376, 378 (9th Cir. 1996) ("[T]he status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute 'appropri-

while the DOL cites *Mertens*'s acknowledgment that "money damages were available in . . . courts [of equity] against the trustee,"[131] it fails to note that the next passage repudiates the DOL's reasoning and mandates a focus on the type of relief rather than the type of court.[132]

Moreover, the DOL's argument fails to meet the command to specify a particular *category* of relief that provides something less than "all relief."[133] Instead, it argues for a blanket acceptance of make-whole relief just because the type of action—breach of fiduciary duty—was historically equitable.[134] In *Mertens,* the Court rejected such a vague request for compensation as nothing other than a claim for compensatory damages—a legal remedy.[135] Because the DOL's argument similarly requests equitable relief without defining any limits on that relief, Scalia is likely to reject that argument as allowing "any type of relief at all." Indeed, Scalia has explicitly ruled out the DOL's approach by rejecting any interpretation of equitable relief which would allow "all relief available for breach of trust."[136] Thus, make-whole relief for breach of fiduciary duty, like restitution and reinstatement, fails as a remedy under the Supreme Court's current ERISA jurisprudence.

C. Surcharge for Breach of Fiduciary Duty Compensates Victims of Health Insurance Denials *and* Satisfies the Supreme Court's Requirements

In light of the rejection of restitution, reinstatement, and make-whole relief as ERISA remedies, plaintiffs like Ms. Cicio may only find meaningful relief by embracing an ancient remedy from courts of equity. Surcharge provides monetary compensation for losses caused by a breach of fiduciary duty, and thus could offer such relief. Moreover, it is a historically

ate equitable relief' . . . ." (quoting Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 13 (1st Cir. 1994)).

131. Brief for the Secretary of Labor, *supra* note 123, at 10 (quoting *Mertens*, 508 U.S. at 256).

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

133. *Id.*

134. *See* Brief for the Secretary of Labor, *supra* note 123, at 12. *But cf.* McLeod, 102 F.3d at 378 ("[T]he status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute 'appropriate equitable relief' . . . ." (quoting Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 13 (1st Cir. 1994)).

135. *Mertens*, 508 U.S. at 255.

136. *Id.* at 260.

equitable remedy, and breach of fiduciary duty is a historically equitable claim. Thus, surcharge for breach of fiduciary duty satisfies both prongs of the Supreme Court's test for equitable relief under ERISA.

1. Surcharge: A Historically Equitable Remedy

Black's Law Dictionary defines surcharge as "[t]he amount that a court may charge a fiduciary that has breached its duty."[137] Surcharge is levied on the trustee and paid directly to the beneficiary to compensate for loss.[138] This historical remedy is the basis of the remedy still recognized by the Restatement of Trusts for breach of fiduciary duty, "which make[s] the breaching trustee 'chargeable with' loss caused, profit made, or foregone profit."[139] Interestingly, while the *Restatement (Second) of Trusts* does not refer to the term "surcharge" directly, the newest revision has revived the term. The *Restatement (Third) of Trusts* explains: "If the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach."[140]

Courts award surcharge not only for lost income or gain, but also for costs incurred by the beneficiary because of the breach of fiduciary duty, including attorney fees.[141] Although surcharge has apparently never been claimed under ERISA, it has been granted for breach of fiduciary duty against bankruptcy trustees,[142] against partners interfering with the receivership of a partnership,[143] and against trustees who have mismanaged trust assets.[144] Bankruptcy trustees, like ERISA benefit plans, are immune from actions by third parties arising in the scope of their official duties, *except* for actions for breach

137. BLACK'S LAW DICTIONARY 1482 (8th ed. 2004).

138. *See* F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1142–43 (9th Cir. 2001).

139. Langbein, *supra* note 15, at 1353 n.208.

140. RESTATEMENT (THIRD) OF TRUSTS § 205, cmt. a (1992); *see also id.* §§ 210, 211.

141. *See, e.g.*, *F.J. Hanshaw Enters.*, 244 F.3d at 1142 (awarding costs incurred due to an attempted bribe of a court-appointed receiver, including attorney fees).

142. *See, e.g.*, *In re* Mailman Steam Carpet Cleaning Corp., 196 F.3d 1, 7 (1st Cir. 1999), *cited in* Langbein, *supra* note 15, at 1352 n.210.

143. *See, e.g.*, *F.J. Hanshaw Enters.*, 244 F.3d at 1142.

144. *See, e.g.*, Mosser v. Darrow, 341 U.S. 267, 272 (1951).

of fiduciary duty—so tort remedies are excluded but historical trust remedies are allowed.[145] An award of monetary surcharge compensating a beneficiary for consequential loss is a common remedy for breach of fiduciary duty in these cases.[146]

2. Surcharge for Breach of Fiduciary Duty Satisfies the Test for Equitable Relief Under ERISA

The Supreme Court holds that to give meaning to the term "equitable" in ERISA, it is necessary to revive the "obsolete distinction" and "ancient classification" of equitable as distinguished from legal remedies.[147] Thus, it should not be surprising that beneficiaries may only find meaningful relief under ERISA by invoking surcharge—an ancient, nearly obsolete remedy from the days of the divided bench.

As previously discussed, the remedy prong of the equitable relief test requires a court to determine whether the "category of relief was typically available in equity"[148] using "standard current works."[149] Surcharge was a historical trust law remedy, as described in the *Restatement (Third) of Trusts*.[150] It is also cited with approval as a remedy for beneficiaries throughout Bogert's treatise on trusts,[151] and is referenced in Scott's treatise.[152]

The Supreme Court is likely to consider Bogert's treatise and Scott's treatise authoritative "standard current works" for purposes of the *Great-West* test. In fact, *Great-West* used these same sources to interpret the scope of fiduciary duties under ERISA in *Varity*,[153] and in *Mertens*, the Court used both sources to interpret ERISA in light of traditional trust law.[154]

145. *See In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d at 7 n.4.

146. *See, e.g.*, *id.*; *Mosser*, 341 U.S. at 272; *F.J. Hanshaw Enters.*, 244 F.3d at 1142.

147. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 216–17 (2002).

148. Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993).

149. *Great-West*, 534 U.S. at 217.

150. RESTATEMENT (THIRD) OF TRUSTS § 205 cmt. a (1992); *see also id.* §§ 210, 211.

151. *See, e.g.*, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 481 nn.34 & 82 (rev. 2d ed. Supp. 2005), § 541 nn.69 & 73 (rev. 2d ed. 1978), § 542 n.6 (rev. 2d ed. Supp. 2005).

152. 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 205, at 238–39 (4th ed. 1987).

153. Varity Corp. v. Howe, 516 U.S. 489, 502 (1996).

154. Mertens v. Hewitt Assocs., 508 U.S. 248, 254, 256 (1993).

Scalia's opinions do not reference the Restatement of Trusts, instead referring to the Restatements of Restitution and of Contracts.[155] However, the Court's reliance on the law of trusts for interpretation of ERISA[156] and Scalia's explicit approval of the use of Restatements, makes it likely he would approve of reliance on the Restatement of Trusts.[157]

Similarly, a trust-based remedy is appropriate for ERISA actions because the Supreme Court has acknowledged that ERISA encodes principles of trust law.[158] Congress intended to define ERISA duties and remedies to mirror trust law duties and remedies.[159] Indeed, *Mertens* bases its interpretation of ERISA on trust law,[160] and *Davila* relies on trust law to define the scope of fiduciary duties.[161] In *Varity*, the Supreme Court declared that the law of trusts was the starting point for interpreting ERISA, although it would also consider text and congressional intent.[162] In fact, in that case, the Court reached its holding solely by relying on the law of trusts because it found no compelling reason to deviate from those principles.[163]

Although Justice Scalia disapproves of some trust-based remedies,[164] his objections do not apply to surcharge. In *Great-West*, Scalia criticizes a U.S. Department of Justice (DOJ) brief that analogizes the relief sought by the petitioner to one form of equitable relief defined in the Restatement of Trusts.[165] The Restatement allows charging a beneficiary for amounts he or she contractually owed to the trust but failed to pay.[166] However, the Restatement remedy cited by the DOJ does not require the beneficiary to *pay* the money owed; rather, it only allows the trustee to collect the money due out of the beneficiary's interest in the trust.[167] As Scalia points out, this is

155. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 211, 213 (2002).

156. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110–11 (1989).

157. *Great-West*, 534 U.S. at 217.

158. *Firestone Tire & Rubber Co.*, 489 U.S. at 110–11.

159. Langbein, *supra* note 15, at 1324.

160. Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993).

161. Aetna Health Inc. v. Davila, 542 U.S. 200, 219 (2004).

162. Varity Corp. v. Howe, 516 U.S. 489, 496–97 (1996).

163. *Id.* at 506.

164. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 219–20 (2002).

165. *Id.*

166. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS §§ 252, 255 (1959)).

167. *Id.*

in contrast to the relief sought in *Great-West*, where the petitioners wanted the beneficiaries to refund amounts owed out of *other* funds not related to the trust.[168] Because the equitable remedy in the Restatement was not truly analogous to the relief sought by the plaintiffs, the Court refused to grant the relief.[169]

In contrast, surcharge is not merely analogous to, but is the exact type of relief sought by beneficiaries harmed by health care denials. Surcharge makes the fiduciary liable for any "loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration," and authorizes "the amount necessary to compensate fully for the consequences of the breach."[170] Indeed, in cases of negligent or willful harm, the fiduciary may be personally liable to the beneficiary.[171]

Unlike a simple request for equitable relief to compensate for loss, which Scalia characterized as "nothing other than compensatory *damages,*"[172] surcharge has substantive differences from damages. Surcharge provides only compensation for financial loss,[173] requires proof of a precise amount of loss,[174] and generally requires bad faith.[175] In contrast, tort damages have a much larger scope—they often compensate for nonpecuniary losses.[176] Also, the measure of tort damages is *not* based on a precise accounting for loss like surcharge, but is based on a fact finder's reasonable estimation of what amount will compensate the plaintiff.[177] Courts also award tort damages with-

168. *Id.*

169. *Id.*

170. RESTATEMENT (THIRD) OF TRUSTS § 205, cmt. a. (1992); *see also id.* §§ 210, 211.

171. *See In re* Cochise Coll. Park, Inc. 703 F.2d 1339, 1357–58 n.26 (9th Cir. 1983); *In re* E Z Feed Cube Co., 115 B.R. 684, 689 (Bankr. D. Or. 1990).

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

173. RESTATEMENT (THIRD) OF TRUSTS § 205 cmt. a.

174. *See* Phelan v. Middle States Oil Corp., 220 F.2d 593, 612–13 (2d Cir. 1955).

175. *See* Sutliff v. Sutliff, 515 Pa. 393, 407–08 (1987) (refusing to grant surcharge against a parent/custodian who misused his child's funds absent a showing of bad faith); RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. g (1959) (explaining that a court in equity may refuse to grant surcharge when there is no evidence of bad faith).

176. RESTATEMENT (SECOND) OF TORTS § 905 (1979) (stating that damages may be rewarded for bodily harm and emotional distress).

177. *Id.* § 912 cmt. a.

out a showing of bad faith. Thus, surcharge has more in common with equitable restitution, which Scalia approves as an equitable remedy, than with damages.[178]

Scalia distinguishes equitable restitution from legal restitution because equitable restitution deals with a specific sum or property transferred from the plaintiff to the defendant.[179] Like equitable restitution—and unlike damages—surcharge is based on an exact accounting of the financial losses incurred by the plaintiff.[180] Moreover, both remedies require a finding of unfairness: equitable restitution requires unjust enrichment[181] and surcharge requires bad faith misadministration.[182]

The fact that surcharge provides limited rather than all relief is key to its acceptance as an equitable remedy. In *Mertens*, Justice Scalia rejected the proposed remedy, in part, because it was not limited to something less than legal damages and thus robbed the adjective "equitable" of any meaning in the phrase "equitable relief."[183] In contrast, because surcharge is limited to direct financial losses incurred by the plaintiffs, this remedy distinguishes equitable relief from all relief. It excludes damages for nonepecuniary losses and losses incurred without bad faith as well as punitive damages.

The claim prong of the test for equitable relief asks whether the claim was historically available in equity. Relief for breach of fiduciary duty was not only typically, but *exclusively*, available in courts of equity.[184] The Dobbs treatise cited

178. Professor Langbein briefly mentions surcharge and describes it as precisely equivalent to legal damages. *See* Langbein, *supra* note 15, at 1352–53. However, as explained in this section, there are important differences between surcharge and damages.

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

180. *See* Phelan v. Middle States Oil Corp., 220 F.2d 593, 612–13 (2d Cir. 1955).

181. *See Great-West*, 534 U.S. at 229 (Ginsburg, J., dissenting).

182. *See* Sutliff v. Sutliff, 515 Pa. 393, 407–08 (1987) (refusing to grant surcharge against a parent/custodian who misused his child's funds, absent a showing of bad faith); RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. g (1959) (explaining that a court in equity may refuse to grant surcharge when there is no evidence of bad faith).

183. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 259 n.7 (1993). For a discussion on this distinction, see *infra* Part II.A.1.

184. *See* Brief for the Secretary of Labor, *supra* note 123, at 2.

by Scalia[185] confirms that trust and fiduciary cases are historically and substantively equitable.[186] In actions for breach of fiduciary duty, the Restatement explains that the law of trusts "required the fiduciary to restore the beneficiary to 'the position in which he would have been if the trustee had not committed the breach of trust.'"[187] Furthermore, the *Restatement (Third) of Trusts* specifically recommends the historically equitable remedy of surcharge for this exclusively equitable action.[188]

Unlike the relief rejected by Scalia, surcharge for breach of fiduciary duty is based on the law of equity. In *Great-West,* Scalia argues that an injunction to pay money due on a contract is not equitable relief because it derives from principles of contract law, which was in the domain of courts of law, not courts of equity.[189] In contrast, surcharge for breach of fiduciary duty is equitable relief because the fiduciary duty derives from principles of equity.[190]

Finally, courts have determined that surcharge for breach of fiduciary duty is equitable relief for purposes of the right to a jury trial. In *In re E Z Feed Cube Co.*,[191] the Bankruptcy Court applied the Supreme Court's two-part test to deny a jury trial because the nature of the claim and the type of relief were both historically equitable.[192] In contrast, where the remedy for breach of fiduciary duty was characterized merely as money damages, the court granted a jury trial because the type of relief was legal.[193]

Surcharge for breach of fiduciary duty passes the Supreme Court test for equitable relief under ERISA, because surcharge is a historically equitable category of remedy and because breach of fiduciary duty is a historically equitable claim. However, the question remains whether such a remedy would provide effective relief to plaintiffs like Ms. Cicio.

185. *See, e.g.*, *Great-West*, 534 U.S. at 211 n.1 (citing 1 DAN B. DOBBS, LAW OF REMEDIES § 1.2, at 11 (2d ed. 1993)).

186. DOBBS, *supra* note 185, §2.6(3), at 163.

187. Brief for the Secretary of Labor, *supra* note 123, at 12 (quoting RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. a, at 458).

188. *See* RESTATEMENT (THIRD) OF TRUSTS § 205 cmt. a (1992).

189. *See Great-West*, 534 U.S. at 213.

190. *See* RESTATEMENT (THIRD) OF TRUSTS § 205 cmt. a; Langbein, *supra* note 15, at 1352–53 (citing 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 205, at 238–39 (4th ed. 1987)).

191. 115 B.R. 684 (Bankr. D. Or. 1990).

192. *Id.* at 689.

193. *See* Pereira v. Farace, 413 F.3d 330, 340–41 (2d Cir. 2005).

3. Surcharge for Breach of Fiduciary Duty Would Compensate Victims of Wrongful Health Insurance Denials

Wrongful health insurance denials can constitute a breach of fiduciary duty actionable under ERISA. ERISA defines a fiduciary to include anyone who "exercises any discretionary authority or discretionary control" over the plan's "management," "administration," or "assets."[194] When a health insurer decides what is medically appropriate treatment for a beneficiary, that professional owes a fiduciary duty not to put the financial interests of the health insurance company over the best interests of the plan beneficiary.[195] In *Davila*, the Court held that a medical insurance company in an ERISA plan is a fiduciary, and the act of the company's employee in denying benefits is a fiduciary act.[196] Indeed, courts routinely recognize that a wrongful denial of health care benefits by an ERISA health insurance plan may constitute a breach of fiduciary duty for which there is relief under ERISA's other appropriate equitable relief provision.[197]

Surcharge is an appropriate remedy for the type of breach represented by wrongful health insurance denials. Wrongful insurance denials are closely analogous to other claims for which surcharge is granted, such as a misadministration of trust funds. Both claims are based on a breach of trust by a fiduciary. Like a trust fund administrator, ERISA plans are required to administer the plan solely in the interest of beneficiaries.[198] A misadministration of trust funds is actionable because it results in lost income and costs to beneficiaries. Similarly, a misadministration of an ERISA healthcare plan

194. 29 U.S.C. § 1002(21)(A) (2000) (defining "fiduciary").

195. *See* Bedrick v. Travelers Ins. Co., 93 F.3d 149, 154 (4th Cir. 1996); *see also* Cicio v. Does, 321 F.3d 83, 86–87 (2d Cir. 2003), *vacated sub nom.* Vytra Healthcare v. Cicio, 542 U.S. 933 (2004) (mem.). Furthermore, in this situation, the court need not apply the deferential "abuse of discretion" standard that applies to most ERISA plan discretionary decisions, but may require an "objectively reasonable" interpretation of plan terms such as "medical necessity." *See* Bynum v. Cigna Healthcare of N.C., Inc., 287 F.3d 305, 311 (4th Cir. 2002). In some cases, this principle has even led courts to construe ambiguity in a plan term against the insurance company. *See* Bailey v. Blue Cross & Blue Shield of Va., 67 F.3d 53, 57 (4th Cir. 1995).

196. Aetna Health Inc. v. Davila, 542 U.S. 200, 219 (2004) (citing 2A *supra* note 190, §§ 182, 183; GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 541 (rev. 2d ed. 1993)).

197. *See, e.g.*, Bowerman v. Wal-Mart Stores, 226 F.3d 574, 590–92 (7th Cir. 2000); *Bedrick*, 93 F.3d at 154.

198. *See* 29 U.S.C. § 1104(a)(1) (2000).

can result in lost income and costs to repair the damage. In both cases, such losses may be payable as surcharge.

Although surcharge cannot compensate for nonpecuniary losses, it would provide effective compensation for financial losses incurred because of wrongful healthcare denials. Surcharge compensates the beneficiary of a trust for any financial loss, "including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration," caused by a breach of the fiduciary's duty.[199] A court will grant surcharge only where the plaintiffs make a precise accounting of the financial loss.[200] Some courts also require a showing of bad faith.[201] In a case like Ms. Cicio's, she could prove direct costs for intensive medical care and for the funeral. She might also prove lost income. Because surcharge compensates only financial losses, she would not be able to receive compensation for loss of consortium, emotional distress, or punitive damages. Ms. Cicio might also be able to prove bad faith because of the insurer's almost automatic denial of benefits and disregard for the prevailing standard of care.[202] Moreover, the insurer had a profit interest in the decision to deny care. Although such an interest always exists, the plan cannot base benefit decisions on a profit interest which is adverse to a beneficiary's interest.[203] If Ms. Cicio can show the insurer likely acted on such an adverse interest, that would imply the insurer made its admittedly incorrect medical decision in bad faith.[204] Thus, surcharge would provide a meaningful remedy for her under ERISA.

CONCLUSION

The Supreme Court has painted victims of wrongful healthcare denials into a corner, cutting off remedies available

199. RESTATEMENT (THIRD) OF TRUSTS § 205 cmt. a (1992); *see also id.* §§ 210, 211.

200. *See* Phelan v. Middle States Oil Corp., 220 F.2d 593, 612–13 (2d Cir. 1955).

201. *See* Sutliff v. Sutliff, 515 Pa. 393, 407–08 (1987); RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. g (1992).

202. *See* Cicio v. Does, 321 F.3d 83, 87–88 (2d Cir. 2003), *vacated sub nom.* Vytra Healthcare v. Cicio, 542 U.S. 933 (2004) (mem.).

203. 29 U.S.C. § 1104.

204. *See, e.g.*, Mosser v. Darrow, 341 U.S. 267, 272 (1951) (finding that willfully setting up an interest adverse to the interests of the trust beneficiaries, which is then acted on, is sufficient to support an award of surcharge even when the beneficiaries have incurred no loss).

under ERISA while construing ERISA to preempt all other remedies. In doing so, the Court has left these patients with no compensation for their loss. Most commentators have concluded that the only way out of this corner is for the Court to erase its precedents or for Congress to rewrite the statute.

Lower courts have fashioned remedies that provide some compensation to these patients. Unfortunately, as this Note demonstrates, those solutions are unlikely to meet the current Supreme Court test for ERISA equitable relief. That test requires both a historically equitable claim *and* a historically equitable remedy that is clearly distinguished from legal remedies.

However, by embracing the Court's revival of the ancient classification between law and equity, plaintiffs can find appropriate ancient remedies that fulfill the Court's requirements. Surcharge, the historically equitable remedy for breach of fiduciary duty, meets the tests for equitable relief under ERISA and is substantively distinguished from legal damages. Most importantly, it offers a chance at compensation for victims of wrongful health insurance denials.