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IN THE SUPREME COURT OF THE UNITED STATES

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GREAT-WEST LIFE & ANNUITY :
INSURANCE COMPANY, ET AL., :
Petitioners :
v. : No. 99-1786
JANETTE KNUDSON, ET VIR. :
- - - - -X

Washington, D.C.
Monday, October 1, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:04 a.m.

APPEARANCES:

JAMES F. JORDEN, ESQ., Washington, D.C.; on behalf of the
Petitioners.

PAUL R.Q. WOLFSON, ESQ., Assistant to the Solicitor
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behalf of the United States, as amicus curiae,
supporting Petitioners.

RICHARD G. TARANTO, ESQ., Washington, D.C.; amicus
curiae, in support of the judgment below.

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
JAMES F. JORDEN, ESQ.	
On behalf of the Petitioners	3
PAUL R.Q. WOLFSON, ESQ.	
On behalf of the United States, as amicus curiae,	
supporting the Petitioners	18
RICHARD G. TARANTO, ESQ.	
Amicus curiae, in support of the judgment	
below	28

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 99-1786, Great-West Life & Annuity Insurance Company v. Janette Knudson.

Mr. Jordan.

ORAL ARGUMENT OF JAMES F. JORDEN

ON BEHALF OF THE PETITIONERS

MR. JORDEN: Mr. Chief Justice, and may it please the Court:

Petitioners' claim for injunctive and declaratory relief to enforce the terms of the reimbursement clause in the benefit plan at issue in this case falls squarely within the language of ERISA, section 502(a)(3)(A), which appears in full text at page 13 of our brief, which provides for a civil action by a fiduciary to enjoin any act or practice which violates the terms of the plan.

In its first amended complaint, Great-West sought injunctive and declaratory relief prior to the time any of the funds were disbursed in this matter in the State court proceeding. It sought injunctive relief and other appropriate equitable relief to enforce the terms of the employee benefit plan.

QUESTION: Now, you say to enjoin any act or --

1 do you think that includes to enjoin your refusing to pay
2 me money that you owe me? Because it doesn't just say to
3 enjoin. It says, to enjoin any act or practice, or (B) to
4 obtain other -- other -- appropriate equitable relief.
5 So, I -- you know, I take that to mean an injunction that
6 is a normal equitable injunction, an injunction -- an
7 injunction that is equitable relief. And -- and that puts
8 the burden on you to -- to show that refusing to pay me
9 money that you owe me can be enjoined in equity, which I
10 don't think it can.

11 MR. JORDEN: Well, Your Honor, we believe that
12 the language and the structure and the purpose of ERISA
13 support the proposition that section 502(a)(3)(A),
14 specifically in this case (a)(3)(A), to enjoin the
15 Knudsons from disbursing funds as to which they had power
16 to determine --

17 QUESTION: Well, if you want to talk about
18 purpose, I frankly don't see why it is in accord with the
19 purpose to limit the relief to equitable relief.

20 MR. JORDEN: Well, Your Honor, we believe it is
21 equitable relief.

22 QUESTION: You know, if the only way to get the
23 relief is at law, the purpose of the act would -- would
24 allow you to get relief at -- at law. But -- but the act
25 chose not to go that far. It just says, you know, to

1 enjoin any act or to obtain other appropriate equitable
2 relief.

3 So, you don't think the injunction portion, to
4 enjoin any act or practice, refers to normal equitable
5 injunction. It could be -- it's a type of injunction that
6 would not have been available in equity.

7 MR. JORDEN: Well, Your Honor, two things.
8 First, I believe in this case on these facts the
9 injunction was a typical injunction. Prior to the time
10 actions were taken by the Knudsons to disburse any of the
11 funds from -- from Hyundai, an injunction was sought
12 against them to prevent them from disbursing those funds
13 until the Federal claim under 502(a)(3) --

14 QUESTION: Why isn't that clearly wrong? I
15 mean, if you have an adequate remedy at law, I don't think
16 you can issue an injunction. What's wrong with the
17 perfectly adequate remedy, that you go bring a suit under
18 State law? You attach the asset, and if you win, you get
19 the money. What's inadequate about that?

20 MR. JORDEN: Two points on that, Your Honor.
21 First -- first is that if you're assuming that there's an
22 adequate remedy at law --

23 QUESTION: I didn't assume it. I want you -- I
24 say why isn't it an adequate remedy at law. And if it is
25 an adequate remedy at law, why isn't that the end of this

1 case?

2 MR. JORDEN: Well, one would have to presume
3 that we were seeking money damages in this case.

4 QUESTION: You could go into a court of equity
5 in the year 1750 where they really knew equity --

6 (Laughter.)

7 QUESTION: -- and I guess that they would have
8 said, I'm not going to issue you the injunction that you
9 happened to get here because you have an adequate remedy
10 at law. And -- and as I read this, I can't get over in my
11 mind that there is an adequate remedy at law. That's why
12 I asked you the question. I'm trying to get your answer.

13 MR. JORDEN: In fact, Your Honor, the concept of
14 a constructive trust, which is -- which is employed by
15 many of the lower courts, the courts of appeals, to
16 enforce these reimbursement causes --

17 QUESTION: Well, I know many constructive -- I'm
18 going to stop you because -- right where you're going.
19 I've found many cases where you impose a constructive
20 trust on funds that go out of the trust and you trace
21 those funds. But I can't find the case -- and you may be
22 able to get me one -- where you impose a constructive
23 trust on money that never originated from a trust that has
24 nothing to do with this. Now, maybe if you -- so, in your
25 answer right now, maybe you can cite me that case.

6

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1 MR. JORDEN: Judge Posner -- Judge Posner in
2 Health Cost Controls, Your Honor, v. Washington held that
3 a constructive trust was a proper remedy in this context.
4 And indeed, at common law, a -- in imposing a constructive
5 trust, courts of equity decided -- concluded, because
6 after all, a constructive trust was essentially imploding
7 legal remedies because the person attempting to -- to
8 impose the constructive trust did not have legal title to
9 the property, therefore courts of equity had to step in
10 and impose an equitable remedy.

11 QUESTION: What you -- what you sought here, Mr.
12 Jorden, was an injunction, I take it.

13 MR. JORDEN: That is correct, Your Honor, and
14 that is precisely within the language --

15 QUESTION: Yes, and I want to ask you some
16 detail about the injunction that was granted.

17 Was it simply an injunction that required the
18 respondent here to hold onto the funds, or was it an -- an
19 injunction against their refusing to pay the funds to you?

20 MR. JORDEN: We sought an -- an injunction at
21 several levels, Your Honor.

22 QUESTION: Yes. Which one was finally issued?

23 MR. JORDEN: None, Your Honor.

24 QUESTION: Well --

25 MR. JORDEN: No injunction was issued. No

1 injunction was issued. The injunction was denied by the
2 district court.

3 QUESTION: And -- excuse me.

4 QUESTION: And what -- what were the terms of
5 the injunction which you sought?

6 MR. JORDEN: We sought an injunction either to
7 -- for the Federal court to enjoin the State court
8 proceeding from -- from the second -- from enforcing that
9 settlement or to enjoin the Knudsons, the respondents in
10 this case, from disbursing the funds that were ultimately
11 paid out in that settlement or from directing parties who
12 received those funds from disbursing those funds.

13 QUESTION: But you didn't seek an injunction
14 against them for refusing to pay you the funds?

15 MR. JORDEN: Well, as a part of the mandatory
16 injunction, the language of the mandatory injunction that
17 was sought, Your Honor, was to pay the plan the \$411,000
18 that the Knudsons, unjustly enriched, owed back to the
19 plan.

20 QUESTION: Well, supposing that you have a claim
21 against somebody for \$1,000 because you painted their
22 house, could you go into court and get an injunction
23 against them refusing to pay the claim to you?

24 MR. JORDEN: Well, Your Honor, the concept of
25 specific performance for the payment -- for the

1 enforcement of an obligation is definitely an equitable
2 concept. And as this Court in Bowen determined, when you
3 are seeking to enforce against someone that they -- that
4 they carry out the very obligation that, either under a
5 statute or under the terms of a plan, they're obliged to
6 carry out, as was the case in Bowen, the fact that money
7 might ultimately be paid does not make that money damages.
8 That's still specific relief.

9 QUESTION: Okay. That doesn't -- that doesn't
10 rule out equity.

11 But take the case -- I was going to ask you a
12 question similar to the Chief Justice's. Let's assume
13 someone has signed a promissory note, and on the date the
14 promissory note becomes due, the individual is entitled to
15 an inheritance under a probate court decree. Would equity
16 grant an injunction at the behest of the noteholder
17 against using the inheritance for any purpose other than
18 paying the note? I would have thought not. And that
19 seems to be very similar to the situation that you're in
20 here.

21 MR. JORDEN: It is not clear to me if equity
22 would have done that, Your Honor.

23 But I will say this. If Congress decided in
24 502(a)(3) to permit fiduciaries to enforce the terms of a
25 plan, they -- they cited in 502(a)(3)(A) the authority to

1 seek injunctions to enforce the terms of the plan. It is
2 clear that at common law injunctions were equitable in
3 nature. The fact that in a later portion of 502(a)(3) it
4 refers to other appropriate equitable relief, it seems to
5 us, simply reinforces the notion that fiduciaries -- first
6 of all, fiduciaries have an obligation --

7 QUESTION: So, you're, in effect, saying that
8 (B) -- the reference to equity in (B) does not limit the
9 breadth of the authority in (A). That's your real
10 argument, isn't it?

11 MR. JORDEN: That's part of our argument, Your
12 Honor. It is absolutely.

13 Section 404(a) of ERISA obligates fiduciaries to
14 enforce the terms of the plan. It's one of their
15 obligations.

16 QUESTION: And is -- is that --

17 MR. JORDEN: It's hard to --

18 QUESTION: Is that argument based on the
19 assumption that if a legislature increases the injunctive
20 authority of a court by statute, that injunctive authority
21 is still equitable?

22 MR. JORDEN: Your Honor, since I understand --

23 QUESTION: If you think it would -- I think you
24 would want to say --

25 MR. JORDEN: -- that the Congress cannot --

1 cannot simply grant injunctive authority and call it
2 equitable. However, it is quite clear --

3 QUESTION: Yes, but --

4 MR. JORDEN: -- that enforcing the terms of a
5 trust are equitable.

6 QUESTION: I -- I thought you would answer yes
7 because it seems to me that helps you. I -- I --

8 MR. JORDEN: Well, I think --

9 QUESTION: I would assume that a legislature, if
10 it's a State court -- or the Congress, if it's a Federal
11 court -- can say the injunctive power extends beyond what
12 was traditionally equity to A, B, and C and that you could
13 still call it fairly equitable.

14 MR. JORDEN: Oh, yes, Your Honor. That is true.
15 Absolutely.

16 QUESTION: And -- and in this case it was in
17 conjunction with declaratory relief I thought. Have we
18 ever said that declaratory relief is equitable or --

19 MR. JORDEN: Is equitable in nature? I don't
20 know, Your Honor.

21 QUESTION: Isn't it clear that declaratory
22 relief is neuter? That is, you can have a declaratory
23 relief, I -- X owes Y X amount of money. That's the
24 declaration. A declaratory judgment can be either,
25 depending upon what else you ask for.

1 MR. JORDEN: Well --

2 QUESTION: What else you could ask for.

3 MR. JORDEN: That's correct, Your Honor. A
4 declaratory relief can be both. The declaratory relief
5 here clearly would be equitable in nature because it's
6 enforcing the terms of a plan. The Congress --

7 QUESTION: You talk about injunction and
8 specific performance. The one word that I haven't heard
9 from you yet -- and I'm surprised I haven't -- is
10 restitution.

11 MR. JORDEN: Yes, Your Honor.

12 QUESTION: That this is what you're seeking is
13 to get back, to recoup what's owed the plan from this
14 larger pot.

15 MR. JORDEN: We are seeking restitution, which
16 is clearly an equitable remedy, which was recognized by
17 this Court's decision in Mertens as an equitable remedy
18 and -- and reconfirmed in the more recent decision --

19 QUESTION: Mr. Jordan, may I ask --

20 MR. JORDEN: -- of Harris Trust.

21 QUESTION: -- a question not quite along these
22 lines of whether you properly sought an injunction, but
23 acknowledging that you did seek an injunction and it was
24 refused? And as I understand it, the Federal court, the
25 district court, refused in part because the petitioner,

1 Great-West, said that it only had a right to that part of
2 the settlement allocated to past medical expenses and that
3 only \$13,828 was allocated to past medical expenses. That
4 was part of the reasoning in the denial.

5 MR. JORDEN: That is correct, Your Honor.

6 QUESTION: And -- and as I understand it, Great-
7 West did not appeal from that. I mean, it just -- you've
8 accepted that apparently.

9 MR. JORDEN: No, Your Honor. Great-West --

10 QUESTION: There was no appeal, was there?

11 MR. JORDEN: Yes, Your Honor. There was --
12 there was a -- that case, the pending case -- a summary
13 judgment motion was filed by Great-West seeking the
14 Federal court, notwithstanding the judgment in the State
15 court -- of course, Great-West was not a party to the
16 State court proceeding, Your Honor. The Federal court
17 proceeding -- the summary judgment motion was filed
18 seeking the reimbursement claim, the restitution amount.
19 The district court denied that, and that case was appealed
20 to the Ninth Circuit. The Ninth Circuit said we don't
21 have jurisdiction because you're seeking money.

22 And -- and our position is, first, we were
23 seeking an injunction. That gave the Federal district
24 court jurisdiction. That gave -- that gave a cause of
25 action which they could consider under 502(a)(3)(A). And

1 beyond that, we're seeking restitution for the balance of
2 the money that is owed the plan based on the unjust
3 enrichment of the --

4 QUESTION: Why was it that Great-West didn't
5 intervene in the State suit? Certainly it knew about it.

6 MR. JORDEN: Yes, it did.

7 QUESTION: Or try to subrogate the claims some
8 way?

9 MR. JORDEN: Well, that goes to the question of
10 whether Great-West -- Great-West had no obligation to
11 intervene. In -- in some cases, in fact, in Jefferson-
12 Pilot v. Krafka, which is -- which appears at page 29 of
13 our -- of our brief, in the footnote 11 -- State courts
14 have no jurisdiction to construe the terms of an ERISA
15 plan except under section 502(a)(1)(B) of ERISA which
16 allows a participant to bring a claim for benefits.

17 Now, if the participant had wanted, as the
18 Court-appointed amicus brief argues that this should have
19 all been decided in one court -- if the participant had
20 wanted to have this decided in State court, they could
21 have brought Great-West in by alleging a claim under
22 502(a)(1)(B).

23 Now, the State court would have had concurrent
24 jurisdiction. That is the only place in ERISA which gives
25 State courts jurisdiction to construe the terms of a plan.

1 Bearing that in mind, Justice O'Connor, if
2 Great-West were to intervene, it would be asking the State
3 court to construe the terms of the plan to determine the
4 status of its restitution rights.

5 QUESTION: May I just interrupt you? I'm not
6 quite clear on that. Why do you have to construe the
7 plan? It seems to me the plan is perfectly clear. You're
8 enforcing the plan. You're not construing it.

9 MR. JORDEN: Well, I think, Your Honor, if you
10 look at the -- at the district court's decision, which --
11 excuse me -- the State court decision, joint appendix 143,
12 the State court makes very clear that it is in the process
13 of making its decision reviewing -- it calls it the health
14 insurance policy. It's not really that -- reviewing the
15 terms of the plan and construing the terms of the plan for
16 the purpose of determining what's the appropriate
17 restitution, what's the appropriate reimbursement.

18 Our position is the State court had no
19 jurisdiction to do that unless they were doing so under a
20 claim brought by the respondents under 502(a)(1)(B), in
21 which case, of course, we could have removed that to
22 Federal court.

23 Not having done so, we also don't have a right
24 to go into State court and ask the State court to construe
25 that.

1 Now, one of the reasons why 502(a)(3) has to
2 give us a right to enforce the terms of the plan is
3 because we know the beneficiary has a right to do that.
4 Under 502(a)(1)(B), it can go into State court or Federal
5 court and enforce the terms of a plan, including to get
6 benefits and money.

7 Second, we ought to be able to go into a Federal
8 court and enforce the terms of the plan. And the fact
9 that we get money shouldn't preclude us from doing that.

10 And finally, Congress requires us to go in and
11 enforce the terms of a plan under 404. And indeed, courts
12 have uniformly said we're entitled to do that. For
13 example -- a very clear contract case -- if an employer
14 fails to make the contributions to a plan, where is the
15 fiduciary going to get the authority to go and sue the
16 employer? Under 502(a)(3)(A). That is where they go.

17 So, there is no reason why -- Congress clearly
18 intended under 502(a)(3)(A), when you're enforcing the
19 terms of a plan, unlike as in Mertens where you were not
20 enforcing the terms of a plan, where you were not
21 enforcing the terms of a specific provision of ERISA, here
22 it is clear that we should be entitled to enforce the
23 terms of a plan even if that means preserving -- returning
24 money to the plan.

25 QUESTION: But you --

1 QUESTION: But it has -- it has to come within
2 the limits of -- of the equitable adjectives in -- in the
3 section you're talking about.

4 MR. JORDEN: Well, Your Honor, if it's an
5 injunction, it doesn't -- our view is it -- it is
6 equitable. By -- by definition, Congress has said it's
7 equitable.

8 QUESTION: Well, you -- well, you say then
9 Congress, when it said you can grant an injunction, didn't
10 mean an injunction of the kind that the courts of equity
11 traditionally grant, but just anything the court felt
12 like.

13 MR. JORDEN: Well, we believe, Your Honor --

14 QUESTION: Is that what -- is that what you're
15 arguing?

16 MR. JORDEN: No, I would say not, Your Honor. I
17 would say that Congress -- as this Court has said, ERISA
18 principles start from trust principles unless the
19 language, the structure, or the purpose of ERISA is to the
20 contrary with respect to the particular issue. There are
21 -- trust principles apply in enforcing the terms of a
22 plan. You can't enforce the terms of a plan unless you're
23 applying trust principles. That means any injunction to
24 enforce the terms of a plan by definition must be
25 equitable in nature.

1 QUESTION: Well, I -- I certainly don't follow
2 that at all. But you're certainly entitled to make the
3 argument.

4 QUESTION: You were making the argument that in
5 any case restitution was an equitable remedy. Therefore,
6 even if we leave injunction and specific performance out
7 of it, what you're seeking --

8 MR. JORDEN: Yes, Your Honor.

9 QUESTION: -- is restitution --

10 QUESTION: But it isn't equitable.

11 MR. JORDEN: Restitution --

12 QUESTION: My -- my book of restitution says
13 sometimes it's equitable, sometimes it's legal.

14 MR. JORDEN: That is true, Your Honor. And --
15 and citing to Judge Posner again in -- in Health Cost
16 Controls, he says it's legal in a legal case and equitable
17 in an equitable case.

18 QUESTION: It's just what my book says.

19 MR. JORDEN: And in that case -- in those cases
20 where -- where a plan is seeking restitution, it's
21 equitable in nature.

22 If I may reserve, Your Honor.

23 QUESTION: Very well, Mr. Jordan.

24 Mr. Wolfson, we'll hear from you.

25 ORAL ARGUMENT OF PAUL R.Q. WOLFSON

1 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING THE PETITIONERS

3 MR. WOLFSON: Mr. Chief Justice, and may it
4 please the Court:

5 I'd like to start with the point that was being
6 made by my colleague, which is that this is the only
7 mechanism by which a plan can enforce a term of the plan.
8 This is equitable relief under ERISA. It can be -- a
9 number of kinds of equitable relief are available. If not
10 a mandatory injunction, then the classic forms of
11 equitable relief, specific enforcement of the terms of a
12 plan --

13 QUESTION: I've looked up every one of those,
14 and having looked up every one of them, our research so
15 far shows that there is no category, specific,
16 restitution, anything else, that this would count as
17 equitable because in each instance, they would have said
18 that there is an adequate remedy at law and there is no
19 basis for a constructive trust, because this is not funds
20 that come out of the trust. Rather, it's exactly what
21 Justice Souter said.

22 MR. WOLFSON: Several points --

23 QUESTION: That's the question I posed, and
24 that's what I would like --

25 MR. WOLFSON: Several points, Justice Breyer.

1 First of all, there is no adequate remedy -- there is no
2 adequate or certain remedy at law in a situation like
3 this. ERISA itself does not provide for a claim of money
4 damages.

5 And it's very important to remember we're
6 talking about whether a -- a term of the plan can be
7 enforced. There is a strong Federal policy in favor of
8 some mechanism for enforcement of the term of the plan.

9 Now, there's no -- Mertens teaches us there's no
10 Federal action for damages based on a violation of the
11 plan. There is no State law action for damages for a
12 violation of the plan because this -- this is governed
13 exclusively by Federal law. It involves the construction
14 of a term of the plan. And indeed, if the plan were -- if
15 the plan were to seek an action for damages or an
16 injunction under State law, that would be deemed
17 completely preempted by Federal law under -- under this
18 Court's previous decisions. So -- excuse me.

19 QUESTION: So, you say that -- that under this,
20 since it's exclusively Federal causes of action and since
21 the Federal statute does not provide for any legal remedy,
22 that any so-called equitable remedy is available because
23 there is no legal relief.

24 MR. WOLFSON: My point, Justice Scalia, is --

25 QUESTION: Is that -- is that your point? So,

1 you could bring an injunction -- if a plan provided that
2 somebody would pay a lump amount of cash to the plan on a
3 certain day, you could bring an injunction to prevent that
4 person from failing to pay the lump amount of cash.

5 MR. WOLFSON: Well, if -- if the plan provided
6 -- it's quite possible if the plan provided, for example,
7 that an employer would make a contribution to the plan, to
8 ensure that the plan was adequately funded, in the amount
9 of \$1,000 a month and then the employer refused to do so,
10 it's difficult to believe Congress intended that there be
11 absolutely no remedy for enforcement of such a central
12 term of the plan which would be necessary to make sure
13 that the plan could continue in existence.

14 QUESTION: Well, but -- okay. Why did -- why
15 did Congress limit the relief to the term equitable then?
16 It could have -- it could have given a much broader
17 charter, but our cases interpreting it have said it means
18 equitable.

19 MR. WOLFSON: Mr. Chief Justice --

20 QUESTION: That is a real limitation.

21 MR. WOLFSON: There are -- there are in -- this
22 ties to one of Justice Breyer's points. There are
23 examples under which courts of equity would enforce, by
24 specific enforcements, contracts to pay money. And these
25 are -- we've cited to Pomeroy, and there's a lengthy

1 footnote in that page at Pomeroy we've cited in our brief.
2 Examples, contracts to pay insurance, contracts to pay
3 indemnity, contracts to hold harmless, all of which bear a
4 strong family resemblance to the kind of thing we're
5 discussing --

6 QUESTION: But the key to this is your statement
7 that there is no remedy in the State court because it's
8 interpreting the plan. If a beneficiary -- can a
9 beneficiary sue the plan in State court where
10 interpretation of something is required? Is there some
11 kind of lawsuit where they can do that?

12 MR. WOLFSON: A beneficiary could -- could sue
13 the plan under 502(a) --

14 QUESTION: Okay. Now, that being so --

15 MR. WOLFSON: Right.

16 QUESTION: -- because -- follow me because it's
17 quite important to me. Why then couldn't you say, but of
18 course this isn't preempted, of course the right remedy is
19 the State court remedy for damages, and of course in that
20 situation Congress intended the plan to be able to sue to
21 get their money back, and whatever interpretation is
22 necessary by the State judge is fine? Why can't you say
23 that?

24 MR. WOLFSON: Well, first of all, even if the
25 beneficiary sued the plan under 502(a)(1)(B) of ERISA,

1 that is a Federal law lawsuit. So, there's no question
2 that still Federal law governs. So, there's no question
3 at all about resorting to a separate corpus of State law
4 to interpret the plan.

5 Second, Congress for various reasons said that
6 the beneficiary could sue the plan in State -- in State
7 court. It did not provide that the plan could sue the
8 beneficiary in State court. ERISA is quite clear that
9 that has to be in Federal court. There's exclusive --
10 exclusive jurisdiction over a civil action brought to
11 enforce an action brought by a fiduciary for -- for the
12 various kinds of equitable relief set forth in section
13 502(a)(3). So, for one, as is in the plan's shoes, it is
14 equitable relief under ERISA or nothing. And that --

15 QUESTION: So, we should have a Bivens cause of
16 action.

17 (Laughter.)

18 MR. WOLFSON: Well, it -- it did occur -- that
19 did occur to me in the last hour, Mr. Chief Justice.

20 Now -- now, one other point. The complaint does
21 say for -- the complaint was framed when the money had not
22 yet left Hyundai and was framed at that point in terms of
23 a prohibitory injunction. It did ask for such other
24 equitable relief as might be available. And there are
25 classic forms of equitable relief that would be available,

1 restitution, a constructive trust, or an equitable lien,
2 which might -- any number of which might be applied in
3 this case depending on who might be the appropriate
4 defendant or what -- what theory or where the money is and
5 so forth.

6 Now --

7 QUESTION: But you're -- you're saying that
8 given the timing of the suit, this falls literally
9 squarely within subsection (A).

10 MR. WOLFSON: At the timing of the suit, I think
11 there would have been -- there would have been no problem.
12 A prohibitory injunction would have very properly been
13 issued by the district court to prevent the funds in the
14 settlement from being disbursed in violation of the plan,
15 which is how (a)(3)(A) is framed.

16 And there is a res, by the way. It may not be
17 money that came -- it may not be the exact same dollars
18 that came from the plan, but the settlement check and the
19 amounts that are derived from it are a res over which a
20 constructive trust might properly issue.

21 Another point about money coming from the plan.
22 In Harris Trust, the case that the Court decided a couple
23 of years ago, that was a claim -- an equitable claim for
24 restitution. And the Court had no difficulty with
25 concluding that such an equitable claim would lie.

1 But I don't think anybody thought that Salomon
2 Brothers, which had participated in the fiduciary breach
3 -- I don't think anybody thought they were still holding
4 the same dollars that they had obtained by participating
5 in the breach of the fiduciary duty. I mean, it was -- it
6 was a question of replacing those dollars, and that's --
7 and that's a proper application of the equitable remedy of
8 restitution.

9 QUESTION: Mr. Wolfson, I -- I want to be clear
10 about the Government's position. The Government's
11 position is that if you're under (a)(3)(A), it must be a
12 classic equitable injunction that you're seeking?

13 MR. WOLFSON: No.

14 QUESTION: Or rather, it doesn't matter? in
15 which case, I don't know why you're going into all of
16 this.

17 Is the Government's position that under
18 (a)(3)(A) you can enjoin any act that is in violation of
19 commitments made under the plan?

20 MR. WOLFSON: I don't think it is limited by
21 (a)(3)(B) that says appropriate equitable relief. I
22 think --

23 QUESTION: Okay. So, whether -- whether it
24 would be an ordinary injunction that a court of equity
25 would give out or not, you -- or courts have the power to

1 enjoin. Is that right?

2 MR. WOLFSON: Well, Justice Scalia, I don't
3 think Congress can simply declare that black is white. I
4 mean, Congress cannot simply declare that something is an
5 injunction which isn't really an injunction.

6 But there is a question as to whether (a)(3)(A)
7 might be limited to prohibitory injunctions as opposed to
8 mandatory injunctions, but --

9 QUESTION: Yes, because it says enjoin any act,
10 not -- not any failure to act.

11 MR. WOLFSON: But -- but (3) -- but (3)(B)(ii)
12 also refers to enforcement of the term of the plan, and
13 that -- that is --

14 QUESTION: Well, do you think -- do you think an
15 injunction can issue under (B)?

16 MR. WOLFSON: (B) little -- (B)(ii), little
17 Roman ii, refers to enforcement of the term of the plan I
18 believe. And I think specific enforcement of a term of
19 the plan, which is again a remedy which was typically
20 available in a court of equity, would classically fall
21 under that situation and then not --

22 QUESTION: Well, but can't -- don't you think
23 you can make an argument that since Congress has dealt
24 with injunctions in (A), (B) does not authorize
25 injunctions?

1 MR. WOLFSON: Mr. Chief Justice, I -- I wouldn't
2 slice it that -- you know, that closely. Enforcement of
3 the term of the plan very often might require an order in
4 the nature of specific enforcement of a plan that might
5 not fall -- if -- if (a)(3)(A) were limited to prohibitory
6 injunctions, I think (a)(3)(B) would be there to remain.
7 And as the Court pointed out -- made clear in Harris
8 Trust, all of (a)(3) is really kind of a catchall or a
9 safety net kind of remedy that's there to ensure that
10 plans are enforced according to their terms. That is a
11 fundamental --

12 QUESTION: May I go back to --

13 MR. WOLFSON: -- policy of ERISA. Excuse me.

14 QUESTION: -- to Justice Scalia's question about
15 (a)(3)(A)? Supposing the statute said to compel any party
16 to do X, Y, or Z, and to -- in such a case they may call
17 the remedy an injunction, even though it wouldn't
18 otherwise, would that be -- does Congress have power to do
19 that? Compel the party to pay money, list all the things
20 that the plaintiff here is asking for, but not describe it
21 as an injunction and then say, and they may call that an
22 injunction if that relief is granted. Why couldn't they
23 do that?

24 MR. WOLFSON: Well, Congress could do it, but I
25 don't -- I mean, Congress could do it. But I think an

1 ordinary understanding of the term injunction -- it
2 doesn't have to be limited to a specific analog that a
3 court of equity might have issued in 1685, and Congress
4 can expand the court's injunctive power. I don't think
5 that Congress was intending to say, well, it's really
6 damages, but we'll just call it -- call it an injunction.
7 But this is not --

8 QUESTION: Thank you -- thank you, Mr. Wolfson.
9 Mr. Taranto, we'll hear from you.

10 ORAL ARGUMENT OF RICHARD G. TARANTO

11 AMICUS CURIAE, IN SUPPORT OF THE JUDGMENT BELOW

12 MR. TARANTO: Mr. Chief Justice, and may it
13 please the Court:

14 I'd like to summarize the three points I want to
15 make for why petitioners' money suit does not request
16 appropriate equitable relief and therefore is outside
17 502(a)(3).

18 My first point --

19 QUESTION: May I just be sure you cover it
20 before you get through? What about it being within
21 (a)(3)(A) and that (a)(3)(A) just gives the word enjoin a
22 very broad, non-historic meaning, according to my
23 hypothetical a second ago? Why is that impossible?

24 MR. TARANTO: I -- I think because of the word
25 other in -- in the -- the provision. To -- to separate

1 the enjoin clause from the other appropriate equitable
2 relief I think does impossible violence to the
3 congressional specification that injunctions are a subset
4 of the appropriate equitable relief.

5 One practical consequence I think that would
6 follow from wrenching those apart would be that a plan
7 could write a liquidated damages or some other damages
8 provision into the plan and then seek an injunction for
9 payment of that money. I don't think that that --

10 QUESTION: What would be so terrible about that?

11 MR. TARANTO: Oh, I'm not sure that there would
12 be anything terrible, and I don't think there would be a
13 congressional -- I mean, I think Congress could call a
14 remedy anything it wants, subject to constitutional
15 constraints, for example, Seventh Amendment constraints,
16 and Seventh Amendment issues might well arise.

17 QUESTION: How would you enforce a liquidated
18 damages provision, assuming a plan has one?

19 MR. TARANTO: I don't think one is enforceable.

20 QUESTION: So, there's a lot of stuff that's --
21 that's permissible under ERISA that is simply not
22 enforceable in courts.

23 MR. TARANTO: I don't know how much. Liquidated
24 damages -- I will make specific reference to another
25 provision of 502, which is 502(g). The question --

1 Congress specifically dealt with the question of
2 delinquent contributions by enacting section 515. It
3 limited 515 to delinquent contributions from multi-
4 employer plans and plans adopted pursuant to collective
5 bargaining agreements. And then it said there's a
6 specific remedy for that, 502(g)(2), which talks about
7 legal relief. That expanded the universe of relief
8 available for a particular kind of monetary issue which
9 includes liquidated damages.

10 But the limitations that Mertens I think
11 correctly identified in 502(a)(3) -- namely, it's limited
12 to equitable relief -- by its terms, carves out of the
13 universe of remedies that our legal system has
14 traditionally thought necessary one particular or one --
15 one subset of that relief and says this is all that's
16 available.

17 There are other circumstances ERISA by virtue of
18 a broad but not universal preemption in which plan terms
19 are not, in fact, remediable. When beneficiaries seek
20 medical treatment to which they're guaranteed under the
21 terms of a plan and don't get it in time before it becomes
22 a moot point, those provisions become unenforceable. It's
23 not unheard of in ERISA.

24 Now, I do want to say that I think that the
25 particular interest that we're talking about here, the

1 plan's interest in recourse to recover money that ought to
2 come from somebody else -- namely Hyundai, the third-
3 party tortfeasor or alleged third-party tortfeasor -- I
4 think need not be viewed as unavailable. I think that
5 preemption law does not go so far as to rule out, in
6 particular, the plan's suit as subrogee in State court, a
7 plain, garden variety tort suit --

8 QUESTION: Why -- why subrogee? Because this to
9 me now I'm thinking, having listened to this, is a key
10 point to me. Why can't the plan simply bring an ordinary
11 contract action attaching the asset in State court?

12 MR. TARANTO: That -- that --

13 QUESTION: Why does it have to be a subrogee?

14 MR. TARANTO: Well, I think that this Court's
15 preemption decisions, as I read them, don't make that
16 impossible, but make it more difficult.

17 QUESTION: All right. Now, are we dealing with
18 language in decisions that didn't focus on this
19 circumstance? Because it's very hard for me to believe
20 that Congress would not have wanted the plan to be able to
21 sue people who owed them money including beneficiaries.
22 After all, the purpose of ERISA is to protect the assets
23 of the workers in plans. So, I'm -- I'm quite interested
24 if you can say anything more about this point.

25 MR. TARANTO: Well, I -- I do think that this

1 Court's preemption decisions, from Pilot Life and some of
2 its successors, have language in them that, taken all by
3 themselves, might suggest that any contract cause of
4 action on the same subject that is addressed in one of the
5 ERISA remedial provisions would be preempted. Each of
6 those cases, in fact, involved requests for greater relief
7 than was made available, and that might well be a problem
8 for the kind of contract action you're talking about here.
9 If that relief is legal relief and it's covered by
10 502(a)(3) as a subject matter and Congress did not provide
11 for it, there is a fairly strong inference that that kind
12 of relief was relief that Congress did not want provided.

13 QUESTION: Now, which -- which would be the
14 easier route? If I'm convinced that, of course, Congress
15 wants the plan to be able to get its money back, legally
16 now is it more proper to say it's not preempted the State
17 court action, ordinary contract with attaching the assets?
18 Or is it more legally correct to say there is no State
19 court action; therefore, there is no adequate remedy at
20 law; therefore, an action close to restitution or specific
21 performance lies?

22 MR. TARANTO: Well, I -- I don't think that it,
23 in the end, works to say that anytime equitable relief --
24 that anytime there's no legal relief, then there must be
25 equitable relief because then I think we've erased the

1 distinction Congress has meant -- has created.

2 I do think the subrogation action presents a
3 much easier case, indeed a case that ought to fall outside
4 preemption law. It has not been the case under ERISA and
5 it has not been the case under the Labor Management
6 Relation Act section 301 provision that ERISA draws on
7 that, as petitioners' counsel said, every suit involving
8 interpretation of the plan is preempted, every State court
9 suit. This Court, for example, in the Lingle decision,
10 which I did not cite in -- in my brief, but Lingle against
11 Magic Chef at the very end says plan interpretation -- or
12 I guess collective bargaining agreement interpretation in
13 the 301 context -- is something that State courts can do
14 as an adjunct to a suit where the elements of liability
15 and the duties are determined otherwise.

16 QUESTION: Mr. Taranto, what about the presence
17 of State subrogation laws where the State has a strong law
18 reflecting its policy that there shouldn't be any
19 subrogation actions in the State court?

20 MR. TARANTO: Well, I -- I think that I would
21 agree with petitioners that the question of the plan's
22 rights are matters of Federal law, and I don't think it is
23 possible for a State to say an ERISA plan that does
24 provide in terms for subrogation, stepping into the shoes
25 of the beneficiary's tort claim -- I don't think a State

1 could properly deprive the plan of -- of that right. I
2 think that would be a matter of -- of Federal law.

3 But once the plan --

4 QUESTION: All other State restrictions on
5 contracting are overridden simply because it's an ERISA
6 contract?

7 MR. TARANTO: I don't know about all -- all --

8 QUESTION: Provisions for excessive punitive
9 damages? I mean, there are all sorts of State provisions
10 for contract law. They're -- they're all to be set aside
11 once -- once you have an ERISA contract?

12 MR. TARANTO: Well, I -- I guess I -- I should
13 say, although I guess it's not my place to be doing a lot
14 of conceding this morning, but I would be happy, of
15 course, if -- if many State laws were not preempted.

16 I think for purposes of this case in addressing
17 the -- the concern about whether plans have recourse, a
18 very narrow question is presented, and that is whether
19 plan's tort suit against the alleged tortfeasor is
20 preempted because not in determining whether the -- the
21 third-party alleged tortfeasor violated a tort duty and is
22 liable, not in determining the amount of -- of overall
23 harm caused, but rather, in deciding whether the plan can
24 be there as a plaintiff and what portion of any such
25 recovery would belong to the plan, those essentially

1 ancillary matters, which might require interpretation of
2 the plan -- those, it seems to me, don't get preempted.
3 And as long as those don't get preempted --

4 QUESTION: It's very odd that you'd have a -- a
5 body of Federal common law that can be applied only in
6 State courts.

7 MR. TARANTO: Well, I -- I don't think that this
8 would be only in -- in State courts because there could be
9 -- I mean, the interpretation of -- of many plan
10 provisions is going to come through an (a)(1) action, the
11 beneficiary suing for -- for benefits. There may be
12 specific kinds of equitable relief that is -- that are
13 requested that would fall under 502(a)(3).

14 My -- my point is that there is no reason to
15 distort what I think is the natural meaning of equitable
16 relief based on an admittedly serious concern that a plan
17 might not have recourse for money because I think the plan
18 does have recourse for money through bearing the burden of
19 pursuing that money against the tortfeasor, in which the
20 interpretation of the plan is ancillary and -- and
21 incidental just like at the very end of the Lingle against
22 Magic Chef decision, which was then quoted and picked up
23 again in the Livadas decision in 1994, in the labor
24 contract context. State courts are entitled, despite a
25 generally very broad preemption of the labor contract

1 interpretation, to interpret labor contracts. So too with
2 respect to the plan for this limited role for subrogation.

3 QUESTION: Mr. Taranto, you -- what you're
4 telling us then is that there would be no preemption in
5 this class of cases, that in this class of cases where the
6 plan insurer is saying we want to get from this recovery
7 the amount that we advanced, that in this class of cases
8 you would have an entirely Federal law governed claim that
9 could only be brought in State court.

10 I don't want to talk about the other claims that
11 you might have, but here where the plan insurance company
12 says, here's this tort recovery, we want our piece of it,
13 we want that restored, we want our advance restored to us,
14 for that category of case, you're telling us you have a
15 claim under Federal law that can be brought only in State
16 courts.

17 MR. TARANTO: I -- I -- if I can say it slightly
18 -- slightly differently. I think that the State tort law
19 is the claim -- creates a claim for negligence and any
20 damages caused by that. What subrogation does, which I
21 think ought to be a matter of Federal common law which
22 probably just follows the terms of an ERISA plan, is say
23 that the plan can step into the shoes of the beneficiary's
24 rights under State law. And I do think that that mode of
25 proceeding to find essentially a -- to find a recovery out

1 of money that in justice, according to petitioners, ought
2 to come from the third-party tortfeasor is available in
3 State court. And therefore, a principal worry about
4 adhering to what I think is the natural meaning of
5 equitable relief in (a)(2) -- in (a)(3) weakens
6 substantially.

7 QUESTION: I -- I see that except for one point.
8 I don't see why you're going down the subrogation route,
9 which at least one of the amicus briefs suggests would
10 cause a lot of problems, rather than simply saying it's a
11 straight contract action under State court -- under State
12 law. Why? What's the -- you have a reason for doing it.

13 MR. TARANTO: The -- the reason that I --

14 QUESTION: Is what?

15 MR. TARANTO: -- that I have suggested is that
16 the contract action between the plan or its fiduciary,
17 which the cases have not treated as identical, but the
18 contract action against the -- against the beneficiary to
19 -- for a supposed violation of the terms of the plan feels
20 an awful lot like the subject matter covered directly by
21 (a)(3). And if, therefore, that contract action would be
22 requesting relief that could only really be legal relief,
23 there would be a much stronger preemption argument, a
24 conflict preemption argument, that says Congress really
25 did say we want equitable relief, we don't want legal

1 relief, and that would be a stronger preemption --

2 QUESTION: At which point you'd say that
3 Congress certainly didn't mean they can't sue people to
4 get money belonging to the plan. We have the -- am I
5 right? I'm trying to -- it's a kind of circle, and I'm
6 trying to see if I have the -- all the parts.

7 MR. TARANTO: I -- I think we're understanding
8 each other, and I -- and I can see the way out of the --
9 the stronger preemption argument as to -- as to that. I
10 think the preemption argument as to the subrogation suit,
11 the ordinary tort suit, is much, much weaker to begin with
12 and therefore doesn't require as -- as strong a -- a
13 response.

14 QUESTION: Mr. Taranto, can I ask you to respond
15 to an argument that occurs to me? If -- going back to the
16 text of (a)(3), if you just had (a)(3)(A), I -- I think
17 you've agreed one could read that to just have a sort of a
18 statutory injunction that is divorced from prior equity
19 practice and just includes doing anything that is
20 necessary to comply with the plan. But you respond to
21 that by saying, but (B) says other equitable relief, which
22 therefore has the effect of narrowing what otherwise might
23 be a permissible reading of (A). Am I correct that that's
24 your --

25 MR. TARANTO: Yes.

1 QUESTION: But my -- my -- the reason I'm
2 concerned about that response is it seems to me that (B)
3 was intended to broaden the remedies available rather than
4 to narrow them, and you're necessarily construing it as a
5 narrowing construction.

6 MR. TARANTO: Well, I -- I think I'm construing
7 it in -- in two ways. Perhaps as narrowing, but more
8 importantly as clarifying what otherwise would, I think,
9 be the more reasonable reading of (A), the enjoin clause,
10 even if there were nothing else. I think the more
11 reasonable reading would be injunctions as equity made
12 them available.

13 When I read -- what your first comment said, if
14 all that was there was the enjoin language, I think that
15 language by itself might be taken to mean enjoin any
16 violation of the terms of the plan. I don't think that
17 that would be the better reading even without the language
18 that follows, but I think the language that follows
19 compels adoption of that because it characterizes as
20 equitable relief the injunctions provided for in the first
21 clause.

22 QUESTION: Is there any legislative history
23 indicating why Congress limited the relief which it
24 permitted in this section to equitable relief?

25 MR. TARANTO: I'm not aware of any. I -- I have

1 reviewed the -- the legislative history, the collective
2 three-volume legislative history, and as I think some of
3 this Court's decisions have -- have indicated, some of the
4 earlier bills contained broader relief provisions, legal
5 or equitable relief, and that was cut back for reasons
6 that at least I don't recall having seen.

7 In -- in the one reference to -- which I cited
8 in -- in my brief I think at page 27 -- in one of the
9 Senate reports that discusses the immediate predecessor of
10 this provision, there's no general reference to any kind
11 of relief that's necessary to -- to make plans protect all
12 of their rights or vice versa. It's been principally a
13 beneficiary protection statute.

14 And there's also no general reference to
15 restitution in the abstract. There's a reference to
16 injunctions and specifically to constructive trusts. So,
17 even there, there isn't a general idea that anytime we're
18 talking about what sometimes are called direct damages or
19 general damages or contractual damages, and therefore
20 making whole the loser of a particular sum of money that's
21 been promised, that that action would somehow be
22 transformed into an equitable action when historically it
23 very plainly wasn't.

24 QUESTION: Any more so --

25 QUESTION: Well, couldn't you have historically

1 gotten --

2 QUESTION: Any more so than -- than the back pay
3 under title 7, which is money? Why isn't this really
4 comparable to that? I mean, Congress, one would assume,
5 didn't want compensatory damages or punitive damages, and
6 that's what they meant when they said appropriate
7 equitable relief. But if back pay, which is fungible
8 money, can be classified as equitable, why not this kind
9 of restitution?

10 MR. TARANTO: Let me -- let me try to answer
11 that -- that this way. This Court has never said that for
12 the important constitutional question, that back pay is
13 indeed equitable relief for Seventh Amendment purposes.
14 It has several times said we are not deciding that and
15 have not decided that.

16 The courts of appeals have, for many years, in
17 fact so held. But if you look back at the original
18 decisions that so held back in the 1960's, they all rested
19 on something that is suggested directly by the language of
20 title 7, which is not that back pay standing alone is
21 equitable and therefore outside the jury trial right, but
22 that equity always had the power to award money when
23 incidental to and intertwined with traditional equitable
24 relief. In -- in the context of title 7, as in the
25 context of the National Labor Relations Act on which title

1 7 was based, back pay enters not as a separately
2 authorized remedy, but as reinstatement with or without
3 back pay.

4 QUESTION: But you could have under both -- I
5 think this is correct -- the Fair Labor Standards Act and
6 under title 7, a monetary remedy without any
7 reinstatement.

8 MR. TARANTO: And -- and I agree that the courts
9 of appeals have, for a long time, treated that as outside
10 the jury trial right, but this Court has never said so.
11 And perhaps more importantly as a matter of congressional
12 intent, there's no reason to think that Congress in 1974,
13 when writing the ERISA provision, was adopting any
14 specialized meaning of equitable relief that Congress may
15 have had in mind in -- in the title 7 context.

16 QUESTION: Well, why wasn't there a reason given
17 -- the limitations on the plan's ability to sue elsewhere?
18 And as Justice Stevens and Justice Ginsburg's line of
19 questioning suggests, it seems to me that if (A) and (B)
20 are both going to do some work in the statute, that to
21 insist that (A) simply embodies the historic definition of
22 equity is -- is too narrow. And you can say that what
23 Congress intended to do was to expand the injunctive power
24 to analogs that are close to equitable actions here in
25 accounting or instructions to a guardian or instructions

1 to a trustee, it seems to me, is very close to historic
2 equitable --

3 MR. TARANTO: But (B) -- (B) does quite
4 definitely, as Harris Trust indicates, expand beyond
5 injunctions the available relief. Because Harris Trust,
6 after all, was a classic form of restitution where the
7 money that was being sought was traceable. It, of course,
8 doesn't have to be the very same money. It can be either
9 money commingled with other funds or the product or
10 profits from it, which are exactly the three things that
11 this Court listed in -- in Harris Trust. That wouldn't,
12 under any circumstance, be an injunction, but it would be
13 a traditionally available form of equitable relief.

14 But that doesn't mean that the whole of
15 502(a)(3), both (A) and (B), can reach beyond the limits
16 that equity made -- set on the relief that the court of
17 chancery would -- would make available.

18 QUESTION: No, but your --

19 QUESTION: Even if Congress has directed
20 otherwise.

21 MR. TARANTO: I'm sorry?

22 QUESTION: The question is, hasn't Congress
23 directed otherwise necessarily in (A)?

24 MR. TARANTO: I -- I don't think so because,
25 again, textually the two clauses are linked by the word

1 other. And if it weren't the case, then again a plan
2 could write a damages provision into its -- into itself
3 and effectively turn (a)(3) into an authorization to get
4 damages by saying we're just seeking, by enjoining the
5 promised damages that you cause, an injunction.

6 QUESTION: But you're -- you're using the word
7 other as -- as implying in (A) a limitation of (A) to only
8 those instances in which a 1750 or whatever court of
9 equity would have awarded an injunction.

10 But isn't there another way of -- of giving some
11 -- some meaning to other here? And that is to say that
12 other was referring back to injunctions which (A) refers
13 to simply as a generic form of relief. Everybody would
14 agree. What -- what's an injunction? A legal remedy or
15 equitable remedy? Sure, it's an equitable remedy. And
16 the only thing that -- that other is referring to in (B)
17 is the kinds of remedy. It doesn't necessarily imply that
18 that kind of remedy, when awarded under (A), was a -- was
19 a remedy only in those instances in which in the old law
20 it could have been awarded.

21 So, why isn't the -- the generic remedy meaning
22 of other a satisfactory construction which then leaves the
23 courts free to issue any kind of injunction under -- under
24 (A) to enjoin a violation of the plan?

25 MR. TARANTO: Well, I -- I guess I -- I find the

1 -- the much more natural reading of this provision in the
2 context of (a)(2) which talks about equitable and other
3 remedial relief and (g)(2) which talks about legal and
4 equitable relief to be that Congress in (a)(3) said we
5 want equitable relief available.

6 And I -- I take it, at least, that a specific
7 illustration of why it doesn't make much sense to separate
8 those -- those apart even aside from what I think is the
9 more natural textual point is that it would allow the plan
10 again to write damages provisions into their terms, the
11 plan's, and then come into court and say, we want an
12 injunction for the beneficiary to pay us any damages that
13 are caused by -- by some act because that's what --

14 QUESTION: Yes, but -- presumably, under --
15 under (A), under any injunction practice, the -- the court
16 would require proof that there was need for an injunction
17 in the first place. In other words, one couldn't simply
18 come in and say, gee, they might violate it, so give us an
19 injunction.

20 But if one could make out a -- a case in the
21 first instance for their need -- of a need for the
22 injunction, that it seems to me would answer your concern
23 that it could be -- that (A) thereby could be turned, in
24 effect, through a plan provision into a general legal
25 remedy.

1 MR. TARANTO: But I'm not sure, I guess, if --
2 if a plan term said the beneficiary -- I mean, I think
3 this could go either way, but to take --

4 QUESTION: You're going to take it one step
5 further and say you can always get an injunction under any
6 circumstances saying pay over the money.

7 MR. TARANTO: Right, right. And I -- and I
8 think that that's -- that that's just so far outside any
9 recognizable concept of -- of equitable relief --

10 QUESTION: Well, I -- I agree but I think it's
11 also pretty likely outside anything that Congress might
12 have been thinking about too. Isn't it? In other words,
13 the -- the very fact that Congress perhaps didn't --
14 didn't have that in mind, because it is so far-fetched, is
15 a -- is a good reason to read (A) as -- as broadly as I'm
16 suggesting.

17 MR. TARANTO: Well, I -- I guess I -- I would
18 say that it's -- it is a better reason either to let
19 Congress alter the statute if unanticipated problems have
20 -- have arisen or, more immediately, to make sure that
21 preemption law isn't taken to an extreme that precludes
22 what I think is the more -- is the preferable solution
23 anyway, which is that there is -- by the very terms of the
24 plan, there's an intrinsic reference of this interest, of
25 this right, to an underlying State court suit. It is

1 preferable from a systemic point of view, from the point
2 of view of avoiding the extra costs of duplicative
3 litigation, of avoiding the potential conflict between
4 Federal and State courts on either the very same or
5 closely related questions for there to be a single,
6 consolidated proceeding in which the entire question gets
7 wrapped up who is supposed to get the single pot of money.

8 There may be special reasons, as there was in
9 this case, where the State court is probably uniquely
10 entitled to create the special needs trust. There are
11 good reasons for that consolidated State court proceeding
12 to be the forum where the plan protects this interest, and
13 preemption law I think very readily allows the plan to do
14 that.

15 As long as there is that outlet, perhaps even
16 under Mertens, if there isn't that outlet, but as long as
17 there is that outlet, then I think the more natural
18 reading of 502(a)(3) should be respected.

19 QUESTION: Mr. Taranto, I think there's some
20 tension between the argument you're making now, which is
21 certainly a persuasive argument, and the cases you cite on
22 page 38 of your brief that talk about the gap between
23 Federal law and State law.

24 MR. TARANTO: Well, those -- I -- I agree that
25 there is -- that there are certain gaps between Federal

1 and State law that, in the beneficiary context, have
2 become all but commonplace because there is an inference,
3 which no court has yet figured a way to -- to supersede,
4 the way Justice Breyer was talking about, that when
5 beneficiary relief under (a)(1) is limited to benefits,
6 it's not that Congress has, in effect, determined that
7 damages that flow from violation of term plans to -- to
8 provide necessary medical services are not available.

9 If the Court has no further questions.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Taranto.

12 The case is submitted.

13 (Whereupon, at 12:02 p.m., the case in the
14 above-entitled matter was submitted.)

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