

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   GREAT-WEST LIFE & ANNUITY           :  
4       INSURANCE COMPANY, ET AL.,       :  
5                   Petitioners           :  
6           v.                           :   No. 99-1786  
7   JANETTE KNUDSON, ET VIR.           :  
8   - - - - -X  
9                                       Washington, D.C.  
10                                      Monday, October 1, 2001  
11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   11:04 a.m.  
14   APPEARANCES:  
15   JAMES F. JORDEN, ESQ., Washington, D.C.; on behalf of the  
16       Petitioners.  
17   PAUL R.Q. WOLFSON, ESQ., Assistant to the Solicitor  
18       General, Department of Justice, Washington, D.C.; on  
19       behalf of the United States, as amicus curiae,  
20       supporting Petitioners.  
21   RICHARD G. TARANTO, ESQ., Washington, D.C.; amicus  
22       curiae, in support of the judgment below.  
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P R O C E E D I N G S

(11:04 a.m.)

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

Mr. Jorden.

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 enjoy 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.

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. Jorden, 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. Jorden.

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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