IN THE SUPREME COURT OF THE UNITED STATES

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JOEL SEREBOFF, ET UX., :

Petitioners :

v. : No. 05-260

MID ATLANTIC MEDICAL SERVICES, :

INC. :

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Washington, D.C.

Tuesday, March 28, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

PETER K. STRIS, ESQ., Costa Mesa, California; on behalf of the Petitioners.

GREGORY S. COLEMAN, ESQ., Austin, Texas; on behalf of the Respondent.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Sereboff v. Mid Atlantic Medical Services.

Mr. Stris.

ORAL ARGUMENT OF PETER K. STRIS

ON BEHALF OF THE PETITIONERS

MR. STRIS: Thank you, Mr. Chief Justice, and may it please the Court:

The question presented today is whether a claim for contractual reimbursement is cognizable under section 502(a)(3) of ERISA.

In this case, MAMSI, the fiduciary of an ERISA plan, seeks monetary reimbursement from the Sereboffs, two beneficiaries of the plan. MAMSI has consistently taken the position that its money claim is governed exclusively by the terms of its contract with the Sereboffs. This contract expressly disclaims and replaces most equitable principles. At its core, MAMSI's claim is nothing more than a request for money damages. This claim is not cognizable under ERISA because MAMSI is not entitled to any relief that was typically available at equity.

JUSTICE SOUTER: May I ask you this? If the

-- if the day before the settlement was consummated, the plan had gone into court and had said the -- the beneficiaries plan to settle the case and they've indicated that they're not going to give us any of the settlement in accordance with the terms of the contract and we want an injunction preventing their distribution to anyone but -- but us, if the -- if the judge believed that and believed that under the contract, the plan was entitled to reimbursement, could the judge have enjoined the -- the distribution of the funds to the -- you know, to the extent of the plan's claim?

MR. STRIS: Well, what I would say, Justice Souter, is that an injunction to -- merely to prohibit distribution would be equitable relief.

JUSTICE SOUTER: Okay.

MR. STRIS: That doesn't necessarily mean, however, that once that injunction issued, the plan could enforce the terms of the contract under ERISA.

JUSTICE SOUTER: Well, it could enforce the injunction.

MR. STRIS: It could enforce the injunction provided that -- that the injunction was not a mandatory injunction. This Court in Great-West clearly held that a mandatory injunction under 502(a)(3), saying pay us this money that's due under the contract,

is not --

JUSTICE SOUTER: No, but that -- that was -- that was an ex post remedy and there were no identifiable funds. What we're talking about here is an ex ante injunction and the funds are identifiable. And you are telling me that, in fact, all the -- all the equity court could have said was, don't pay yourself?

MR. STRIS: Well --

JUSTICE SOUTER: It could not have said, give the $75,000, or whatever it is, to the plan?

MR. STRIS: I -- I would say two things, Justice Souter. The first is that, respectfully, I don't think Great-West made the distinction that a mandatory injunction was impermissible because it was ex post. I think Great-West squarely held that a mandatory injunction is just a clever attempt by lawyers to enforce a contract for legal damages.

JUSTICE SOUTER: Well, when we get down to clever attempts, aren't we at the clever attempt point when -- when you say that they can enjoin the distribution to anybody else, including themselves, but they can't tell them to pay the money to -- to Great-West? I mean, isn't that the point at which we get to silliness?

MR. STRIS: I don't -- I don't think that's true, Your Honor, because we do not take the position that MAMSI or an ERISA plan doesn't have alternative remedies. Of course, there -- that -- that should -- that consideration should be irrelevant because either the claim is legal or equitable, and there are many claims that beneficiaries have for the violation of a plan term that --

JUSTICE SOUTER: But you -- in any case, I don't want to prolong this unduly. You're saying that there would have been some equitable claim and some equitable remedy with respect to the $75,000 that -- that a -- a court could have taken cognizance of the day before the settlement.

MR. STRIS: Oh, to be clear, Your Honor, I will suggest a few remedies that I think might be available here.

JUSTICE SOUTER: No. I'm -- I'm just trying to characterize your answer to me. You said, yes, that would be an injunction and it would be an injunction typical of what courts of equity issue.

MR. STRIS: That's correct.

JUSTICE KENNEDY: But I don't understand.

CHIEF JUSTICE ROBERTS: But -- an injunction pending litigation? Is that the idea just until you

resolve whatever claim it is they have to -- to the money, determine it. It may be a legal claim, an equitable claim, but until you sort it out, you can get an injunction to prevent them from dissipating the -- the claimed funds.

MR. STRIS: That's correct, Mr. Chief Justice, and that's extremely important because we would suggest --

JUSTICE KENNEDY: But I -- I still don't understand. If I'm the -- the trial judge and you ask -- and I'm asked to enter an injunction, I enter an injunction knowing that in the end it's going to be to no purpose? I have to -- I have to be enforcing some ultimate injury of -- of which the plaintiff has standing to assert.

MR. STRIS: That's a fair point, Justice Kennedy, but that doesn't --

JUSTICE KENNEDY: So that's why I don't understand your questions. I would think you'd say no injunction because, at the end of the day, it amounts to nothing.

MR. STRIS: See, I don't think that's true, though, because there's a distinction I'd like to draw between having a remedy under 502(a)(3) of ERISA and having a remedy at all. We would suggest that the plan

can intervene in the State court suit. We would suggest that the plan could write a letter to the tortfeasor notifying the tortfeasor that it has a subrogation right, and if the tortfeasor entered into a release, it wouldn't be viable. So there may be good reason for the Federal court to enter the injunction that you suggested, Mr. Chief Justice, merely to prevent the dissipation of the funds because the funds might need to be preserved for a separate purpose.

JUSTICE SCALIA: Mr. Stris, I'd -- I'd like to know what -- what you make of our opinion in Barnes v. Alexander. It's an old case but it involved a situation similar to this, namely, a contingent fee arrangement with a lawyer, and the client received all the money, without giving the lawyer his contingent fee. We reasoned in our opinion that, quote, the contract for a contingent fee out of a fund awarded constituted a lien upon the fund and that, quote, it is one of the familiar rules in equity that a contract to convey a specific object, even before it is acquired, will make the contractor a trustee as soon as he gets title to the thing. Why doesn't that absolutely resolve the present case?

MR. STRIS: That does not resolve the present case, Justice Scalia, because the -- MAMSI's

interpretation of the Barnes line of cases, the equitable lien by assignment cases, would entirely negate the limitation that Congress put into 502(a)(3). And -- and if you'd permit me to explain why.

A remedy of an equitable lien by assignment, as we explained in our opening brief, is not a restitutionary remedy. No unjust enrichment need be proved. No tracing need be proved. It's purely a contractual remedy.

Now, as a result, courts of equity historically developed this remedy to give priority to one creditor over another if there was a present intent on the part of the promisor to pledge that specific property as security.

JUSTICE SCALIA: But we -- but, you know, our opinions haven't said only certain kinds of equitable relief, only restitutionary equitable relief. We've simply said whether equitable relief would normally be available. And now you're -- you're trying to rewrite our cases to say that only certain types of equitable relief are -- are available.

MR. STRIS: I don't --

JUSTICE SCALIA: And -- and if, indeed, it does -- it does occupy a lot of the field, so be it. That's the way Congress wrote the statute.

MR. STRIS: Yes, that's fair, Your Honor, but that's not what I'm saying. I would -- I would direct the Court's attention to -- to page 211 of the Great-West opinion, note 1, where the Court wrote that any equitable remedy under 502(a)(3) must -- and I quote -- be deemed to contain the limitations upon its availability that equity typically imposes. And my only point --

JUSTICE GINSBURG: Well, what about --

MR. STRIS: -- my only --

JUSTICE GINSBURG: -- what about if you're -- if you're using Great-West, it seemed to me the most relevant point made in Great-West was that the plan could seek restitution in equity where money identified as belonging in good conscience to the plan could clearly be traced to particular funds in -- in the defendant's possession. The problem in Great-West was the money had already been dissipated. It had been set aside.

MR. STRIS: That -- that's true, Justice Ginsburg, and -- and it -- it proves my point more than refutes it, and here's why. Great-West had no -- this Court in Great-West had no occasion to explain when something was traceable or when it belonged in good conscience to the plan. It merely said that you look

to history for those requirements.

And this is why, Justice Scalia, I distinguish between equitable restitution and an equitable lien by assignment. They were both typically available in equity as narrow exceptions to getting money for breach of contract. I concede that. But they had very different requirements, neither of which can be met in this case.

JUSTICE BREYER: Suppose in the 18th century -- I'm not an expert in this. You're more of one. But suppose you had an absolute classical trust. It's the -- it's a trust for the benefit of the fifth grandchild of the Duke of Hamilton. All right?

MR. STRIS: Okay.

JUSTICE BREYER: The trustee. And this trustee, going to the fifth grandchild one day, lends him 1,000 pounds, and he takes his security. The grandchild says, 4 years from now my great, great Aunt Margaret is likely to die and she's going to leave me my ring -- her ring. And the -- the trustee says, fine. When you get the ring, give it to me and that's repayment. Yes, okay, done.

Now, the great, great grandchild being a bit of a --

MR. STRIS: You don't need to say it. I

understand.

JUSTICE BREYER: All right. He keeps the ring.

(Laughter.)

JUSTICE BREYER: All right. My question is could the trustee go to the equity court and say, there it is. It's in his pocket. Equity court, I'd like you to order that ring to be given to the trust. Can that happen?

MR. STRIS: The answer is it depends and --

JUSTICE BREYER: It depends. They couldn't get that?

MR. STRIS: It depends, and that -- and that --

JUSTICE BREYER: What does it depend on?

MR. STRIS: -- and that is my answer to Justice Scalia's question. It -- it depends on whether the -- what the court believed the intent of the great grandson was at the time the promise was made.

JUSTICE BREYER: The great grandson's intent was to get the money as fast as he could, and, in fact, he thinks -- when he'll get the ring, he thinks he'll give it back to the trust but -- at least -- yes. That's what he thinks.

MR. STRIS: Then to be clear, Your Honor,

that would not be enforceable as an equitable lien by assignment, and it's important --

JUSTICE BREYER: In other words, a court of equity could not have taken the ring?

MR. STRIS: That's correct.

JUSTICE BREYER: Like -- what it is it? You have to go back to the 15th century or the 16th? Is there -- is there a case? There must have been cases like that.

MR. STRIS: Well, we -- we cite a -- we cite a series of cases in our reply brief, pages 12 and 13, that all stand for this principle. And it's important to understand why. The reason why is equitable lien by assignment historically only occurred in cases where there was -- for the most part, 99 percent of the times, occurred in cases where there was insolvency. So the fight was between different creditors. And the question was, was there an intent to merely just pay this debt as a promise, in which case we don't give priority of -- of the ring to this one creditor, or was there the intent to pledge this particular piece of property as security, in which case we will give it as priority?

And I'd like to take a step back because I'm concerned that this comes across as a hyper-technical

argument, but it's really not because if we start with the background principle that --

JUSTICE BREYER: Well, then suppose there are no other creditors.

MR. STRIS: If there were no --

JUSTICE BREYER: There's no other creditor.

MR. STRIS: If --

JUSTICE BREYER: See, he goes -- there's nobody. All there is is the ring. Nobody else makes any claim to it whatsoever. Now can the -- can the trustee get it?

MR. STRIS: The answer is still no.

JUSTICE BREYER: No.

MR. STRIS: But -- but I would add to that there -- there are very few cases in that area because in that area the person would usually sue at law for money damages. If they --

JUSTICE BREYER: No. He has no money. All he has is the ring in his pocket.

MR. STRIS: Yes. That's fair. And the cases that do arise, arise because the person wants that specific piece of property. And at equity, it would not be recoverable. It would only be a claim for money damages at law.

Now, to take this --

CHIEF JUSTICE ROBERTS: Can I get back to the -- the Barnes case that Justice Scalia asked you about? Is it a possible distinction of that case that that involved a contingent fee arrangement, and in other words, the lawyer's labors generated the -- the asset, while in this case, the claim depends upon the -- the contractual provision?

MR. STRIS: Certainly, Your Honor, and -- and as we note in our -- in our reply brief, many courts over the years have described Barnes, Wylie, and the other attorney's fees cases cited by MAMSI in this case as -- as very narrow exceptions to the strict rule at equity because in attorney's fees cases, it was the attorney's efforts that created the fund. I don't think we need to rely on that exception.

JUSTICE SCALIA: What -- I don't understand what difference that makes. I mean, in both cases there was a commitment to pay the contingent fee. It was a promise. And when the money was collected, the court said, we're going to enforce an equitable lien upon your recovery in order to comply with the promise.

MR. STRIS: Well, to be clear, Your Honor, we don't rely on the distinction, but we do think the distinction adds some persuasive force, and here's why. My understanding is that these courts viewed the

Barnes line of cases as a hybrid line of cases. They're willing to relax slightly the very strict rules at equity because they think there's an element of unjust enrichment.

CHIEF JUSTICE ROBERTS: Well, you may not -- you may not rely on the distinction, but I would have thought your answer might have been that the lawyer had an equitable claim apart from the contractual provisions so that when you enforce the contractual provisions, Justice Holmes would have thought of it in equitable terms, while here, there's no equitable claim apart from the particular provisions of the contract.

MR. STRIS: Well, in candor, Your Honor, I was attempting to suggest that and clearly I didn't say it as artfully. But that -- that is -- that is what I meant --

JUSTICE SCALIA: Take it. Take it. It's a good one. Right.

MR. STRIS: -- about the -- the distinction

(Laughter.)

MR. STRIS: I will take it.

And it bleeds very nicely into what I was about to say, which is to take a step back as to why this isn't a hyper-technical argument. It's important to start with the background principle that 502(a)(3)

doesn't include legal relief, and this is -- this is significant. If we look at 502(g), there's a very narrow provision for plans to enforce terms that require certain employers to make contributions to plans, and in 502(g) Congress said, well, in this case you can seek liquidated damages to enforce the terms of the plan. You can seek legal relief. In fact, it uses the phrase, legal and equitable relief. So when we sit here today and look at 502(a)(3), it's very easy, particularly on the facts of an individual case, to say, hey, you know, legal relief should be available here. But Congress made the decision only to allow equitable relief.

CHIEF JUSTICE ROBERTS: But why is that? I mean, we spend a lot of time with these old English cases. Why -- why did Congress -- it seems an arbitrary line.

MR. STRIS: I don't -- I don't think it is arbitrary, Your Honor, and I would suggest that there's two reasons why did that.

The first is that as a backdrop rule they believed that it's not a good policy to have fiduciaries suing participants and beneficiaries for money, and when they thought that there was a good reason like 502(g), they expressly enumerated it.

The second reason I think that they -- they did this is because the only times when it might make sense to recover money for the violation of a plan term, for the most part, fall within -- under the rubric of unjust enrichment. And I believe that Congress, rightfully so, thought that there were non -- sufficient non-ERISA remedies whereby a plan could assert truly equitable unjust enrichment claims. So there was no need to provide that remedy in the civil enforcement provisions of ERISA.

So if we look at that as the backdrop rule and apply it to Barnes and that line of cases, I would suggest that MAMSI's reading of the Barnes line of cases is very dangerous.

JUSTICE GINSBURG: Do you -- do you not think that Congress had in mind no compensatory damages, no punitive damages? Do you really think that Congress had in mind the distinction that you are now drawing in the ring case based on 15th and 16th century English precedent?

MR. STRIS: I -- I wasn't suggesting that they had 15th and 16th century cases in mind. Certainly not. I was relying on those cases because Great-West mandates that that's what we do. But I do believe that --

JUSTICE GINSBURG: Yes, but Great-West also said money. It said money, identified as belonging in good conscience to the plan. And why doesn't it belong in good conscience to the plan when the beneficiary has promised that, if it gets a tort recovery, it will reimburse the plan?

MR. STRIS: Okay. Well, that goes to the very heart of why we believe this is a -- a legal claim and not an equitable claim. If we look at the particular plan provision here, it allows MAMSI to totally avoid proving any double recovery. And let me -- let me give an example, Your Honor.

There are 36 States that have limited the collateral source rule. Under the MAMSI plan here, if a particular plaintiff recovered money in a personal injury suit, it clearly could not recover all, in some of the States, part in other States, of its advanced medical expenses because they came from a collateral source. Nonetheless, under the plan, as MAMSI has written it, they can recover their full amount, and there's nothing equitable in allowing a boiler plate provision to authorize the plan to get contract damages.

JUSTICE SOUTER: Well, isn't -- isn't the simple answer to that is that the equity court would

not enforce any injunction or any mandatory order, or whatever the relief was, if it involved double recovery?

MR. STRIS: Well, I -- I don't know how simple that answer is, Your Honor, but I would -- I would take it, as Justice Scalia said a moment ago. And if this Court believes that MAMSI could state that sort of equitable claim, we would be very comfortable with a remand in this case to weigh the equitable factors at issue.

That didn't occur here, though, because MAMSI argued that the contractual terms govern. The court agreed. And so as a result, the disclaimer of the made-whole doctrine, the requirement that MAMSI established double recovery --

JUSTICE GINSBURG: What -- what is the double recovery that you're talking about? The plan has paid out to the care providers the benefits in full.

MR. STRIS: That's correct.

JUSTICE GINSBURG: And now it wants to get back its benefits in full.

MR. STRIS: Right. And -- and I would suggest that at equity, whether we look at it historically or even in a modern sense, a subrogation-based claim or an equitable claim would require MAMSI

demonstrating that some of the settlement it received constituted a payment for medical expenses. And that --

JUSTICE GINSBURG: But the plaintiff could so -- in the tort litigation, if that's what it is, the plaintiff could say, I don't want any medical damages. Give me everything for pain and suffering.

MR. STRIS: That's true, and -- and I would suggest that if that occurred and you applied equitable principles, the insurer could argue, I think rightfully so, that the insurer impaired its subrogation rights. That would be an equitable claim.

The point I'm making, Your Honor, is that none of this occurred here because the procedural posture of this case was a motion for summary judgment at the district court level where MAMSI went in and said all that matters are the contract terms. We don't have to look at whether the Sereboffs were made whole. We don't have to look at whether there was double recovery. We can't consider our diligence in refusing --

JUSTICE GINSBURG: Well, but they look at the medical expenses were something like $75,000 and the settlement was -- what was it? $750,000.

MR. STRIS: $750,000, Your Honor. And -- and

I would suggest that we never had an opportunity to introduce any facts. It --

JUSTICE SOUTER: Well, did you attempt to?

MR. STRIS: We did not, but --

JUSTICE SOUTER: Well, did -- did you respond to the summary judgment by saying, you know, there are reasons why they should -- specific reasons why they shouldn't get the full 75?

MR. STRIS: Yes.

JUSTICE SOUTER: And you were denied a hearing on that?

MR. STRIS: We -- yes. I mean --

JUSTICE SOUTER: That -- that may be a -- a reason for you to appeal on the merits, but I don't see what it has to do with the -- with the jurisdiction of the court as -- as awarding equitable relief. Maybe it did a poor job in deciding what was equitable.

MR. STRIS: I -- I don't --

JUSTICE SOUTER: But it -- it has nothing to do with its power to award an equitable remedy.

MR. STRIS: I don't think that's true, Your Honor, because MAMSI didn't move for summary judgment on an equitable theory. They moved for summary judgment on a contractual theory. And page 8 of their summary judgment motion is -- is particularly clear on

this. It makes clear that the contract creates, governs, and is the end all and be all of their rights.

JUSTICE SOUTER: Well, they would have nothing to say if they hadn't invoked the contract. They've got to invoke the contract. The question is, are they asking for equitable relief?

MR. STRIS: I don't think they have to invoke the contract, Your Honor, in the sense that --

JUSTICE SOUTER: You mean without a contract, they could have gone in and said, we'd like $75,000?

MR. STRIS: Not under 502(a)(3), but certainly under other principles. Equitable principles of subrogation, as MAMSI repeatedly describes in their brief, is a doctrine that is governed by equity. It's created wholly apart of a contract. And we cite numerous cases for the proposition that you can limit by contract --

JUSTICE SOUTER: And are you suggesting that the jurisdiction of the court would have been different if they had gone -- if the -- if the plan had gone in and said, we don't care anything about our contract, we're just relying on equitable principles of subrogation? In that case, are you suggesting the court would have had equitable jurisdiction, whereas when they went in and said, we happen to have a

contractual right to this, the court doesn't have equitable jurisdiction?

MR. STRIS: That is a very difficult question, Your Honor, and I would --

JUSTICE SOUTER: But I think that's implicit in your argument.

MR. STRIS: It is an important question, and I would answer it this way. I would say that that hypothetical presents a much closer question. If the contract merely had a subrogation provision that said we are subrogated and the plan went in and tried to enforce that provision by employing equitable principles, seeking equitable remedies, that would be a closer question. That might be permissible under 502(a)(3). That's not what occurred here.

I think it probably wouldn't be permissible because, although it would seek an equitable remedy, it wouldn't be an equitable remedy to --

JUSTICE SCALIA: Why -- why isn't that what occurred here? What -- what's the essential difference?

MR. STRIS: Oh, the essential difference is that there are various equitable principles that were categorically applied to subrogation claims, including reimbursement versions of subrogation claims. And they

could not be disclaimed or overridden by contract. The burden of the insurer was to establish that there was a double recovery. That's part of the claim. The burden of the insurer was to show that the defendant, the insured, was made whole.

JUSTICE GINSBURG: How does the -- how does the insurer show that if the parties could just say -- the plaintiff can say, I am the master of my complaint. I am not seeking damages for medical expenses. I just want damages for lost earnings, pain and suffering.

MR. STRIS: Right, but my answer to that, Your Honor, would be that if it's a lie, meaning if they did get damages for medical expenses, you couldn't overcome it merely by saying you didn't seek them. And if it's true, meaning in the -- in the tort action the plaintiff didn't actually seek those damages, then there would be an equitable theory called impairment of a subrogation right that could be asserted.

But this is significant. This isn't -- this isn't historical minutia. This is significant because it goes to the heart of whether the claim is equitable or really just a dressed-up claim to say, hey, you breached this contract provision because when you define in the contract -- and this goes to your jurisdictional question, Justice Souter. When you

define in the contract the very contours of reimbursement, all you're doing is mandating contract damages. And here, it's worse than that. MAMSI expressly disclaimed the make-whole doctrine. They did it in the plan. They -- in their motion for preliminary injunction, they cited In re Paris, which is a Fourth Circuit case that governs, and you can do that. And even before this Court, they have -- their footnotes 19 and 20 of their -- of their brief -- they're not -- they're continuing to rely on their ability to do that in their contract.

JUSTICE SOUTER: Okay, but why -- why isn't the answer to your argument the -- the historical answer that courts of equity frequently provided remedies and supplementary remedies when remedies at law were not fully adequate? And they were still equitable remedies. They were still typically equitable, and that's what is being requested here?

MR. STRIS: Well --

JUSTICE SOUTER: Why isn't that the answer to your -- your argument?

MR. STRIS: I would say two things, and then I would -- if -- if I'm permitted, I would like to reserve the rest of my time.

First, I would say that that's not what's

being requested here, and if MAMSI could state that claim, then a remand is required so they can proceed on that theory.

The second thing I would say, though, is that that notion runs square up against Great-West because Great-West said it had to be a claim that was traditionally available in equity, not something that an equity court would have jurisdiction over because of the clean-up doctrine, not something that could come into an equity court for another reason, but a remedy that was traditionally equitable. And when you're looking at something like a constructive trust, MAMSI is correct to point out that it doesn't matter if there's an adequate remedy at law. A constructive trust historically was an equitable remedy that was available in an equity court even if there was an adequate remedy at law. But that doesn't win the day for MAMSI. They still have to prove that they meet the requirements, the tracing requirements, which don't exist here in this breach of contract case, and that's why that remedy is not available.

So, if I may, I'd like to reserve my --

CHIEF JUSTICE ROBERTS: Thank you, Mr. Stris.

Mr. Coleman, we'll hear from you.

ORAL ARGUMENT OF GREGORY S. COLEMAN

ON BEHALF OF THE RESPONDENT

MR. COLEMAN: Good morning, Mr. Chief Justice, and may it please the Court:

Subrogation-based claims have always been fundamentally equitable in nature and fit comfortably within the prescriptive limits of section 502(a)(3). The Court should reject Petitioners' attempt to make these kind of subrogation-based reimbursement provisions universally unenforceable in ERISA plans.

JUSTICE SCALIA: Well, but I mean, once you get out of the contract terms and are trying to make your case on the basis of subrogation, you do have to show that -- that part of the recovery was -- was for the -- for the medical expenses. And has that been shown?

MR. COLEMAN: It has been, Your Honor.

And -- and let me make clear what the plan says. The plan, I think, does three things. The plan memorializes our right to subrogation, a -- a right that has existed in equity in modern times and ancient times throughout the history of equity. Second --

CHIEF JUSTICE ROBERTS: Well, if I can just stop you there. Your -- your friend on the other side cites the many common law cases not allowing subrogation in this sort of situation, or if it does

allow it, subject to the make-whole doctrine.

MR. COLEMAN: I don't believe that he does cite cases disallowing it under circumstances anywhere close to this. He did cite in his brief Trist and other cases from his reply brief that this Court in Barnes expressly disapproved. And so in suggesting that -- that there is not somehow an equitable right that attaches to this type of a plan language, we think that on that additional ground that fails.

This type of a claim is a fundamentally equitable claim. When we pay over the medical expenses, we obtain a right in equity to receive an amount up to that which we have provided to the Petitioner. Our plan reflects that language. Our plan also goes on to say that it contains a commitment that we will look only to the recovery, to the fund that is received from a third party by settlement or judgment. We think that that fits clearly within the language of Barnes, that we are committing ourselves to a recovery that will look only to the fund that is recovered.

JUSTICE BREYER: He just said -- your brother said, well -- because I simplified that to the ring, and he says, well, if in fact you had a subrogation right or some other absolutely clear contractual right to get repaid from the ring, you

know, which is a physical thing, you couldn't -- stronger than your case -- you couldn't get it in equity. If I really knew about the 18th century cases, I would realize that, and it's only my ignorance that and my dissent that prevents me from understanding this.

MR. COLEMAN: I disagree with his response. I think the ring clearly would have been recoverable in equity and I -- I don't think there can be any reasonable question about that.

JUSTICE BREYER: All right, fine. Then where do I look?

JUSTICE KENNEDY: Can you cite us to something for the -- can you cite something to that effect?

MR. COLEMAN: For the -- for the ring proposition?

JUSTICE KENNEDY: For your answer.

MR. COLEMAN: I do think the Barnes line of cases that include with it Walker v. Brown and -- and other cases fully stand for that type of a proposition, that -- that if you have committed to something that -- that requires the return and recovery of a specific item or fund, that is it. I think that type of thing would also fall clearly within the realm of specific

performance, which is a known exception to contract-based claims that falls clearly within -- within the realm of equity.

CHIEF JUSTICE ROBERTS: Well, instead of looking for an equitable counterpart, this is an action for money you think is owing to you under a contract. Why isn't that a classic form of legal relief?

MR. COLEMAN: Because the right to subrogation exists independent of the contract. This Court has said that numerous times. We've cited cases in our brief going back into the 1800's.

CHIEF JUSTICE ROBERTS: So why did you cite the contract in your complaint?

MR. COLEMAN: Because of the specific requirements of ERISA litigation. 502(a)(3) doesn't say that you can bring any claim in equity. It says that we can bring a claim seeking appropriate equitable relief to remedy a violation of the plan or to enforce the terms of the plan. So there is a necessary joining of equity and the terms of the plan when you bring --

CHIEF JUSTICE ROBERTS: If equity -- if the equitable subrogation claim were subject to the make-whole doctrine or -- or these other equitable doctrines, and your contractual claim is not, which relief are you entitled to? The -- the one subject to

the equitable doctrines or the relief that's specified in your contract?

MR. COLEMAN: We believe that the courts of appeals have already resolved that question, and that is that -- first of all, there are -- there are variations on make-whole. Theirs is only one. Their view of it is only one, which is the -- the most --

CHIEF JUSTICE ROBERTS: Is your claim subject to the equitable doctrines or subject to the legal contractual claim?

MR. COLEMAN: I don't distinguish between the two, Your Honor. And ultimately the reason for it is, is that a third part of the plan language is that it contains essentially a pre-agreed allocation. That's all that it does. It says because of the risk of manipulation in these settlements where the insured will settle a third party claim and say, okay, it's a million dollars, but let's write $10,000 in for medicals and the rest will be pain and suffering because we don't want to have to pay back on subrogation. So it is well established, both within and outside the ERISA context, in these types of situations, that the subrogation language will contain an allocation so that when you get the money coming back, it is applied first to the medical damages. That

is -- that is all that it is. It is -- it is not something that exists outside.

JUSTICE STEVENS: Well, are you -- do you contend it's always applied first to the medical damages? In other words, supposing there was -- instead of the $750,000 settlement, it had been $100,000 here. $75,000 was medical, and they had a lot of substantial other claims, pain, suffering, loss of earnings, and so forth. Would you always get your full amount if -- if the amount of the settlement is over the amount of the medical expense?

MR. COLEMAN: I think we would be entitled to it under the -- the terms of the plan.

JUSTICE STEVENS: You think that's the equitable rule.

MR. COLEMAN: Obviously, in -- in doing these things, there's a practical side on -- on the business side when they work these things out. But the reason that claim would settled for $100,000 again speaks to the strength of their claim for other kinds of damages.

JUSTICE STEVENS: Well, it might be because -- it might be because there's contributory negligence, all sorts of things. They might have compromised at 20 cents on the dollar across the board. Why should you get 100 cents when the -- when the rest of the recovery

only gets 20 -- 20 cents?

MR. COLEMAN: Again, it's -- it's because of the nature of the allocation.

JUSTICE STEVENS: That's equitable in your view? What?

MR. COLEMAN: It is because --

JUSTICE STEVENS: You think that's the equitable rule.

MR. COLEMAN: Yes. Courts in equity in -- in -- modern courts in equity in -- in analyzing these types of -- of claims have permitted these types of allocation --

JUSTICE STEVENS: And some do, but some do not I think.

MR. COLEMAN: I think that's an accurate statement outside of the ERISA context, Justice Stevens, that there are courts that enforce one form of make-whole that might not. But there are many States that do enforce a --

JUSTICE SCALIA: You -- you have piqued my curiosity and -- and didn't satisfy it. You say there are variations on make-whole. What -- you were about to describe the variations. What are the variations?

MR. COLEMAN: There are variations that -- the -- the most stringent is Petitioners' rule, which

is we have to be made whole for everything that we wanted to claim, pain and suffering. We thought our claim was $1 million and we didn't settle for $1 million, and therefore, we're not made whole.

There is -- there is another version that is less restrictive than that, but as long as there is a showing that medical expenses have been paid, you get a return of medical expenses.

There are another version -- there's another version that is enforced in many States, including Virginia and California and I -- some others I believe, in which essentially the make-whole runs the other way towards the insurer, that -- that you have basically a first dollar type to ensure that the medical expenses are paid first.

There are -- there are a variety of things, but within the ERISA context, every court of appeals that has addressed this has said that when you put these kinds of terms into the plan -- and they are very common -- we're not going to adopt from various States equitable rules that will contradict the terms of the plan and that will --

CHIEF JUSTICE ROBERTS: Counsel, it seems to me you -- you must be biting your -- your tongue here. There's an easy answer to Justice Stevens and to

Justice Scalia, and it's that we get all the money first because that's what the contract says. But you can't give that answer because then it starts to look like a legal claim. Instead, you get mired in all these obscure equitable doctrines because you're -- when there's a simple answer there in black and white, but it's in the contract. And as soon as you say that, it starts to sound legal rather than equitable.

MR. COLEMAN: Well, the -- the plan contains an allocation agreement that is part of -- the allocation agreement is enforceable. Every court of appeals that has -- has ruled on this issue has said that they are -- that they are not going to adopt State court rules that contradict plan terms because that would be contrary to the intent of Congress in enacting ERISA and in making plan sponsors the -- the governors of plan design. So we didn't want that type of thing to happen. Every court of appeals has ruled that. But that -- that --

JUSTICE BREYER: What do you think --

JUSTICE SCALIA: The fact that your equitable claim, you know, traces itself to a contract certainly doesn't -- doesn't cause it to cease to be an equitable claim. I mean, the classic equitable claim is somebody declaring a trust in exchange for some money, and he

declares a trust. Equity will enforce that trust, but the trust is based on a contractual commitment. Right?

MR. COLEMAN: I believe -- I believe that is correct.

We believe that it runs the other way, that our plan language simply reflects an age-old, historical subrogation right that has existed in equity and that has been slightly modified.

JUSTICE BREYER: If -- if you understand as I -- that four people on the Court took a broader view that Congress didn't want to get into this matter, and restitution is restitution, whatever it means now; but five took the historical view. Now, if we're in the historical view, which we are, that was the majority. At that point, I want to know how you think this case should come out. What words should be written there if I'm thinking of the next case?

And after you win this case, if you do, the next case will simply be precisely the same as yours, but the lawyers, having acted 5 minutes quickly -- more quickly, will mix up all the funds. Now it's commingled and all we have is exactly the same with every future case that you have, and now the pension fund can't get a penny back of the money that it loaned that it should get back in good conscience. No doubt

about it. A promise, good conscience, and they can't get a penny.

Now, you have the interest in telling me what words this Court should write, other than overrule Great-Western, that will prevent that result from coming about. I would like to know your --

MR. COLEMAN: I'll try to get most of that in order.

First of all, the Court did -- has ruled. It's an issue of statutory interpretation, and the Court has not usually gone back on it. We're very comfortable with Mertens. We're comfortable with Great-West. We think --

JUSTICE SCALIA: I should think your response is that Congress provided for only equitable relief.

MR. COLEMAN: Yes, Your Honor.

JUSTICE SCALIA: And -- and that that's the -- that's the answer.

JUSTICE BREYER: In other words, you don't care about these other --

JUSTICE SCALIA: Congress said that.

JUSTICE BREYER: Well, I was actually interested in what your response was because I thought you have an interest in not losing your recovery in all those other cases.

MR. COLEMAN: Your Honor, we are very comfortable within the law that this Court has set out. We believe that the Court has gotten it right.

JUSTICE GINSBURG: Well -- well, why should you be if -- if an -- if this -- if you prevail in this case and then every other personal injury lawyer will make sure that that recovery goes into a trust for the care of the accident victims, never goes into their own investment account.

MR. COLEMAN: Your Honor, that presumes that -- that we don't have things that we can do along the way before it comes into the attorney's hands. This is a very interactive process.

JUSTICE SOUTER: Yes, but Justice Breyer's question is the eggs have gotten scrambled. That's the -- that's the hypothesis. Are you saying or are you going to say you can't unscramble the eggs consistently with -- with the limitation to equitable remedies, or are you going to say you can unscramble the eggs?

MR. COLEMAN: Justice Breyer's example is one specifically related to commingling. Commingling itself does not, in fact, bar --

JUSTICE SOUTER: Well, that's what I meant by scrambled eggs.

MR. COLEMAN: But if -- if you go out and,

you know, give out dollar bills on the street till it's all gone -- we accept that there are limits to our recovery.

JUSTICE SOUTER: Well, how about Justice Breyer's hypothetical? Is the -- is the court under ERISA incapable of dealing with that situation, or is isn't it?

MR. COLEMAN: The -- the commingling situation is one in which the courts would look to see if the person is still essentially in possession of the funds as the Court stated in Great-West. We think under that circumstance it would be.

I can envision circumstances --

JUSTICE SOUTER: Under that -- under Justice Breyer's hypothetical, a court, consistently with ERISA, could give an equitable remedy?

MR. COLEMAN: Yes, absolutely.

JUSTICE SOUTER: Okay.

JUSTICE GINSBURG: But -- but if the recovery is set up in such a way that it never goes into the personal account of the accident victims and, instead, just what happened in Great-West, isn't that what every personal injury lawyer will do if you prevail in this case?

MR. COLEMAN: Then, Justice Ginsburg, we

would test the language at the end of Great-West and we would have to go after a different defendant. And we would -- we would have to test our luck under that type of situation, go after the person in possession or control of the funds, and we would be able to do that. And we believe that courts would -- would allow that and would enforce our equitable rights in that type of a situation. I don't mean --

JUSTICE KENNEDY: Would California allow you to intervene when it has a no-subrogation rule?

MR. COLEMAN: There, I believe there's a strong argument that California might not have permitted us to intervene at all.

JUSTICE KENNEDY: Well, then how are you going to prevent the funds from being commingled or being assigned immediately to a trust?

MR. COLEMAN: I think that our --

JUSTICE KENNEDY: I'm not sure how you can avoid also the trustee being one of the named plaintiffs.

MR. COLEMAN: I -- I think that our remedy is under (a)(3), Your Honor, and that we would -- we would try to act under (a)(3) in terms of enforcing our equitable rights that exist.

JUSTICE SCALIA: Or you might try to get

ERISA amended.

(Laughter.)

MR. COLEMAN: I'm sure you'll wish us luck with that, Justice Scalia. But I think that our rights are sufficiently secure under ERISA as it is now written and under the jurisprudence that this Court has set forward. We believe that our plan sufficiently captures the essence of the age-old equitable subrogation right, that in seeking to enforce that plan, we both capture those subrogation-based rights, but our plan also commits to seek funds solely from a fund, a res, that will come into existence as a result of the third party litigation --

CHIEF JUSTICE ROBERTS: Your theory is that your argument would be exactly the same if you did not have this provision in your contract. It's an equitable claim. It's an age-old subrogation right. You just sue in equity saying, look, I paid the medical expenses, I'm entitled to it. You don't need the contractual provision at all.

MR. COLEMAN: We have a right that exists in equity independent of the plan, but (a)(3) does have that language that you seek appropriate equitable relief to enforce the terms of the plan. That part of it might be missing if we were just out relying solely

on what exists in equity, separate from the plan.

That is why the plan memorializes these rights. It was Congress' intent that we write the terms into the plan so that people can be given notice of what is there and they can accept it. They can understand what is in the plan. And as long as our plan is consistent with -- and we believe it is -- in seeking what is appropriate equitable relief, then we think that the courts have authority to hear these claims.

And really, there's a lot that's been discussed here, but the question that has been presented to the Court is really only does (a)(3) authorize these types of claim. The answer to that is clearly yes, and in asserting that a court should have enforced or should have looked at various equitable defenses, we think that's merely a concession that our claim is equitable in nature and that in asserting these various defenses, that -- that the courts of appeals have unanimously thus far rejected, the Court does not need to look at it. Those courts have correctly decided all of those issues in -- in evaluating the -- the balancing of Congress' intent in enacting ERISA and putting these kinds of terms into play, allowing plan sponsors to have a lot of deference

and leeway over how plans are designed and then enforcing them under (a)(3) in seeking equitable relief.

And we believe that the Fourth Circuit properly evaluated that and that the court's judgment should be affirmed.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Coleman.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

This -- this case is an action for appropriate equitable relief under this Court's decision in Great-West. First, it seeks a specifically identifiable fund, which is the money that Petitioners got from their tort settlement. Second, that fund can be traced to Petitioners. It's sitting now in an investment account, and they've committed to holding it there. Third, the fund belongs in good conscience to the plan because the plan provided that the fund -- that that fund, quote, must be used to reimburse the plan, quote, for benefits paid.

CHIEF JUSTICE ROBERTS: How is this -- to go to your first point, how is this specifically identifiable? No court has said that there's this -- you only want the medical expenses, and no court has said there's this much for medical expenses. You have to figure out how much of the recovery is allocable to medical expenses. In fact, already did that. They cut out some percentage for attorney's fees. It's far removed from the traditional sort of res that we deal with in equity.

MR. FELDMAN: I don't think that's correct, with respect. In Barnes against Alexander and in the whole line of cases that we cite, the Court has made quite clear that parties can commit contractually that a particular fund that will come into existence in the future should be used for a certain purpose, and that will be equitably enforced.

CHIEF JUSTICE ROBERTS: So we -- how enforced? I mean, if you're enforcing a contract, you do that legally not equitably.

MR. FELDMAN: I don't think that's right. And if you're enforcing a contract and you're seeking normal contractual damages of various sorts, you definitely do that legally and not equitably. But equity always enforced contracts. They would enforce

its equitable liens that were created by contract.

For example, in the case of Walker against Brown, which was not an attorney's fees case -- by the way, on -- in Barnes against Alexander, which was an attorney's fees case, nowhere in the decision does the Court rely at all on the fact that this had anything to do with any special rule that applies to attorney's fees.

But that, in turn, relied on the prior case of Walker against Brown in which -- just involved an equitable lien that was created by contract and that a party was trying to enforce. And the Court quoted Pomeroy's Treatise. Now, Walker was decided in 1897. Pomeroy's Treatise on Equity, quote, every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified as a security for a debt, creates an equitable lien upon the property so described.

JUSTICE KENNEDY: Well, what would happen if this case were a weak case on -- on liability and it was settled for $60,000? What would happen to your tracing theory then?

MR. FELDMAN: I think -- in general, I think

that the terms of the plan, both under ERISA law and under these traditional equitable principles that we've talked about or I mentioned just now, that the plan would likely be entitled to get -- get up to the amount of the medical expenses --

JUSTICE SCALIA: Presumably such a weak -- such a weak claim would not be brought because there --

MR. FELDMAN: Right. It is --

JUSTICE SCALIA: -- there's nothing at the end of it.

MR. FELDMAN: It is the case that in extreme cases, for example, the beneficiary has collected the medical benefits, does have some leverage over the plan, and in fact, the plan -- and -- and can say, well, I'm not going to bring the claim, I'm not going to, you know, do what I can to collect the money unless we come to some kind of agreement. And in fact, the plan in this case provides -- that says, the company's share of recovery will not be reduced because your -- you have not received the full damages claimed, unless the company agrees in writing to a reduction. And they leave it open there, in appropriate cases, for the parties to negotiate that.

But there was no bar in equity for an equitable court to enforce an equitable lien that arose

out of a contract where that satisfied the -- the standards for an equitable lien.

CHIEF JUSTICE ROBERTS: Are these claims subject to the qualifications that go along with the equitable lien, the make-whole, whatever the applicable rules are?

MR. FELDMAN: Well, first of all, make-whole I think is best -- there are a variety of make-whole rules in addition to those that Mr. Coleman mentioned. There's rules where you prorate the settlement in certain ways so that you get some proportion. But the basic make-whole rule, as has been described by the courts of appeals, is a default rule and that is where you're just relying on a pure subrogation clause or you don't mention it all in a particular insurance document, then some courts have said you apply some kind of make-whole rule or some other allocation rule to figure out how much of the tort recovery goes to the insurer.

CHIEF JUSTICE ROBERTS: So that wouldn't apply here because you're relying on the contract.

MR. FELDMAN: Right, where you -- where the parties have specified. Even in other -- in insurance law generally, where the parties have specified in the insurance contract how that's supposed to work, then

the courts will enforce that. And there's nothing unusual in courts of equity taking a look at the agreement that was reached between a -- the parties, presumably supported by consideration, in deciding what kind of relief to grant. That was a traditional function that equity served.

JUSTICE GINSBURG: So even if you had an early neutral evaluator who said this entire claim with pain and suffering and the medical, it's -- all together it's $100,000. But there was some contributory negligence. So I think $80,000 would be right. So there would still be no prorating --

MR. FELDMAN: I think, first of all, the -- the question presented in this case is whether there's a cause of action. Those -- that question really goes to the amount of money that gets recovered in the cause of action, and actually the -- the question presented in the petition doesn't squarely present that.

But insofar as where you're going on to that further -- because this case can be just answered by saying, yes, there's a cause of action under 502(a)(3). Now, insofar as the Court goes further into the make-whole doctrine, I think generally courts should -- courts have recognized that under ERISA what they're supposed to do is enforce the terms of the plan.

CHIEF JUSTICE ROBERTS: So what if the plan said -- you know, this is an insurance company. They don't like litigation -- we are subrogated to double whatever the medical expenses are that we contributed? That's our recovery. It's an equitable claim, but it's going to be enforced according to the terms of the plan.

MR. FELDMAN: The Court has recognized that -- that Federal courts, especially in an unusual circumstance like that -- but Federal courts do have the obligation under ERISA to determine a common law of rights and obligations under ERISA plans. And there are doctrines like unconscionability and other doctrines that may be applied in particular cases where some plan is just taking advantage of another party, where --

CHIEF JUSTICE ROBERTS: But you would still call that an equitable claim?

MR. FELDMAN: Yes. It would still be an equitable claim because the question still is are you enforcing the terms of the plan, and -- and the equitable lien cases make quite clear that that court in equity will enforce that so long as a particular -- so long as a particular fund, even if it has not yet come into existence, is what's been specified. In

fact, the cases that are cited by Petitioners' counsel to the contrary, starting with the Trist case, was a case that was specifically disapproved in Barnes against Alexander as resting on other grounds. That was a case where the -- there was a contingent fee for lobbying Congress and there was a statute that forbade it. There were two other grounds that the Court decided the case, and then Justice Holmes in the Barnes case went on to say -- well, insofar as the question is open, he gave the answer, which is the question as to whether there's an equitable lien is determined by what the contract says.

As far as the make-whole doctrine, another point about the make-whole doctrine that's worth keeping in mind is that insofar as some States have applied it, as a matter of their insurance law and have said, well, an insurance company is not allowed under our State's law to contract out of the make-whole doctrine which we -- under our State's law is the default rule. Insofar as a State has said that, that would apply equally to ERISA plans under the insurance savings clause and there wouldn't be any question I think that it would. But --

JUSTICE SOUTER: It would apply simply as a matter of -- of contract construction in determining

what the contract was that -- that would be looked to for determining what equitable remedy would be available.

MR. FELDMAN: That's right. And if the insurance contract departed from what the State's law was, the State's law would govern it under ERISA's insurance savings clause.

But where you have an -- and so the -- the case with ERISA plans is not really any different than it is outside ERISA. Insofar as a State under its insurance law decides to establish a make-whole doctrine or an allocation rule of some sort or a default rule, it can do that, and that can be applied to insured ERISA plans. But as to uninsured ERISA plans, it wouldn't be applied. And that -- this Court established that in its decision in FMC against Holliday.

This case really actually arises -- it was really -- it was at the intersection of two distinct doctrines that -- two distinct lines of cases that both support equitable relief in a case like that. One is the -- those that I've spoken about already, which is the equitable lien cases. The other is the line of subrogation cases that Mr. Coleman spoke about. And from the very earliest times, it was recognized in

subrogation cases that that gave the insurer not only a right to advance the insured's claim, but where the insured advanced the claim and got a recovery, he holds it as a trustee for the insurer. And that was recognized from the early -- from the mid-18th century cases that Mr. Coleman cited in his brief. It was recognized by this Court in Comegys -- the Comegys case, written by Justice Story in the 1820's, and it's been a consistent rule. And this is an appropriate equitable relief to enforce the terms of the plan because it arises directly at the confluence of those two lines of equitable cases.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Feldman.

Mr. Stris, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF PETER K. STRIS

ON BEHALF OF THE PETITIONERS

MR. STRIS: Thank you, Mr. Chief Justice.

In my limited time, I'd like to make three very brief points.

The first point I'd like to make is why these claims are never permissible under 502(a)(3). And I think it comes out of a -- a concession that Mr. Coleman made in his argument. He answered your

question, Mr. Chief Justice -- and he said that they would have had this equitable right without any plan provision. But, hey, they put the plan provision in because that's what section 502(a)(3) requires. You can only get equitable relief to remedy the violation of a plan. That's why these claims are never authorized under 502(a)(3) because they're not really to -- to enforce or remedy the violation of a plan term. More importantly, though, that's not what happened here because in this contract they disclaimed the very equitable principles.

And that brings me to my second point, which is that even if the answer to the question we presented in our cert petition is sometimes, the question is still presented. The answer to the question could be that, as you put it, Justice Souter, jurisdictionally sometimes these claims for reimbursement are authorized, and the sometimes is when the contract doesn't disclaim equitable principles because if the party relies on the contract and fails to establish the equitable principles that make the remedy equitable, then it's nothing more than a breach of contract damages case.

And Mr. Coleman's answer was very interesting. He tried to -- to sort of squirm out of

that by suggesting that, no, it's equitable because this was a pre-allocation of how the money would be distributed. Well, where I'm sitting, that looks an awful like a liquidated damages provision for a breach of contract. And there's nothing wrong with a liquidated damages provision, but this Court has squarely held that that's legal relief when it's for a breach of contract. It's prohibited by section 502(a)(3).

And that brings me to my final point, which is this. Just because the source of the claim is the contract doesn't mean that there can never be an equitable remedy. We never take this position, Justice Scalia. But what it does mean is that the plaintiff has to fit within one of the narrow exceptions at equity for an equitable remedy if they're seeking money for a violation of a plan term.

And I'll close by saying that this theory of lien by assignment is very dangerous because it is not restitution. It does not require tracing. Plans could write terms in that say, if you breach this provision of the contract, we are entitled to specific funds out of any bank account that you may have in the bank at the time that you breach the contract. Under their theory of the Barnes line of cases, that would be

equitable lien by assignment. That clearly bars legal relief.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Stris.

The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)