SUPREME COURT OF THE UNITED STATES

Nos. 02–1845 and 03–83

AETNA HEALTH INC., FKA AETNA U. S. HEALTHCARE INC. AND AETNA U. S. HEALTHCARE OF NORTH TEXAS INC., PETITIONER

02–1845 *v.*

JUAN DAVILA

CIGNA HEALTHCARE OF TEXAS, INC., DBA CIGNA CORPORATION, PETITIONER

03–83 *v.*

RUBY R. CALAD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 21, 2004]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

The Court today holds that the claims respondents asserted under Texas law are totally preempted by §502(a) of the Employee Retirement Income Security Act of 1974 (ERISA or Act), 29 U. S. C. §1132(a). That decision is consistent with our governing case law on ERISA's preemptive scope. I therefore join the Court's opinion. But, with greater enthusiasm, as indicated by my dissenting opinion in *Great-West Life & Annuity Ins. Co.* v. *Knudson,* 534 U. S. 204 (2002), I also join "the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime." *DiFelice* v. *AETNA U. S. Healthcare*, 346 F. 3d 442, 453 (CA3 2003) (Becker, J., concurring).

Because the Court has coupled an encompassing inter-

pretation of ERISA's preemptive force with a cramped construction of the "equitable relief" allowable under §502(a)(3), a "regulatory vacuum" exists: "[V]irtually all state law remedies are preempted but very few federal substitutes are provided." *Id.*, at 456 (internal quotation marks omitted).

A series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief. First, in *Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U. S. 134 (1985), the Court stated, in dicta: "[T]here is a stark absence—in [ERISA] itself and in its legislative history—of any reference to an intention to authorize the recovery of extracontractual damages" for consequential injuries. *Id.*, at 148. Then, in *Mertens* v. *Hewitt Associates,* 508 U. S. 248 (1993), the Court held that §502(a)(3)'s term "'equitable relief' . . . refer[s] to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.*, at 256 (emphasis in original). Most recently, in *Great-West*, the Court ruled that, as "§502(a)(3), by its terms, only allows for *equitable* relief," the provision excludes "the imposition of personal liability . . . for a contractual obligation to pay money." 534 U. S., at 221 (emphasis in original).

As the array of lower court cases and opinions documents, see, *e.g.*, *DiFelice; Cicio* v. *Does*, 321 F. 3d 83 (CA2 2003), cert. pending *sub nom. Vytra Healthcare* v. *Cicio*, No. 03–69, fresh consideration of the availability of consequential damages under §502(a)(3) is plainly in order. See 321 F. 3d, at 106, 107 (Calabresi, J., dissenting in part) ("gaping wound" caused by the breadth of preemption and limited remedies under ERISA, as interpreted by this Court, will not be healed until the Court "start[s] over" or Congress "wipe[s] the slate clean"); *DiFelice*, 346 F. 3d, at 467 ("The vital thing . . . is that either Congress or the Court act

quickly, because the current situation is plainly untenable."); Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Error in *Russell*, *Mertens*, and *Great-West*, 103 Colum. L. Rev. 1317, 1365 (2003) (hereinafter Langbein) ("The Supreme Court needs to . . . realign ERISA remedy law with the trust remedial tradition that Congress intended [when it provided in §502(a)(3) for] 'appropriate equitable relief.'").

The Government notes a potential amelioration. Recognizing that "this Court has construed Section 502(a)(3) not to authorize an award of money damages against a *non-fiduciary*," the Government suggests that the Act, as currently written and interpreted, may "allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench." Brief for United States as *Amicus Curiae* 27–28, n. 13 (emphases added); cf. *ante*, at 19 ("entity with discretionary authority over benefits determinations" is a "plan fiduciary"); Tr. of Oral Arg. 13 ("Aetna is [a fiduciary]—and CIGNA is for purposes of claims processing."). As the Court points out, respondents here declined the opportunity to amend their complaints to state claims for relief under §502(a); the District Court, therefore, properly dismissed their suits with prejudice. See *ante*, at 20, n. 7. But the Government's suggestion may indicate an effective remedy others similarly circumstanced might fruitfully pursue.

"Congress . . . intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief." Langbein 1319. I anticipate that Congress, or this Court, will one day so confirm.