

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOEL SEREBOFF, ET UX., :

4 Petitioners :

5 v. : No. 05-260

6 MID ATLANTIC MEDICAL SERVICES, :

7 INC. :

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9 Washington, D.C.

10 Tuesday, March 28, 2006

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

14 APPEARANCES:

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

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

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

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1 P R O C E E D I N G S

2 (10:02 a.m.)

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

6 Mr. Stris.

7 ORAL ARGUMENT OF PETER K. STRIS

8 ON BEHALF OF THE PETITIONERS

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

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

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

25 JUSTICE SOUTER: May I ask you this? If the

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

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

15 JUSTICE SOUTER: Okay.

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

19 JUSTICE SOUTER: Well, it could enforce the  
20 injunction.

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

1 is not --

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

9 MR. STRIS: Well --

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

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

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

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

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

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

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

22           MR. STRIS: That's correct.

23           JUSTICE KENNEDY: But I don't understand.

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

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

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

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

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

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

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

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

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

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



1 interpretation of the Barnes line of cases, the  
2 equitable lien by assignment cases, would entirely  
3 negate the limitation that Congress put into 502(a)(3).

4 And -- and if you'd permit me to explain why.

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

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

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

22 MR. STRIS: I don't --

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

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

9 JUSTICE GINSBURG: Well, what about --

10 MR. STRIS: -- my only --

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

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

1 to history for those requirements.

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

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

14 MR. STRIS: Okay.

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

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

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

1 understand.

2 JUSTICE BREYER: All right. He keeps the  
3 ring.

4 (Laughter.)

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

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

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

13 MR. STRIS: It depends, and that -- and that  
14 --

15 JUSTICE BREYER: What does it depend on?

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

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

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

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

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

5 MR. STRIS: That's correct.

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

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

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

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

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

5 MR. STRIS: If there were no --

6 JUSTICE BREYER: There's no other creditor.

7 MR. STRIS: If --

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

12 MR. STRIS: The answer is still no.

13 JUSTICE BREYER: No.

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

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

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

25 Now, to take this --

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

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

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

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

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

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

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

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

19 MR. STRIS: -- about the -- the distinction  
20 (Laughter.)

21 MR. STRIS: I will take it.

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. STRIS: That's correct.

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

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

1 demonstrating that some of the settlement it received  
2 constituted a payment for medical expenses. And that  
3 --

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

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

13 The point I'm making, Your Honor, is that  
14 none of this occurred here because the procedural  
15 posture of this case was a motion for summary judgment  
16 at the district court level where MAMSI went in and  
17 said all that matters are the contract terms. We don't  
18 have to look at whether the Sereboffs were made whole.

19 We don't have to look at whether there was double  
20 recovery. We can't consider our diligence in refusing  
21 --

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

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

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

3 JUSTICE SOUTER: Well, did you attempt to?

4 MR. STRIS: We did not, but --

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

9 MR. STRIS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. STRIS: It is an important question, and  
8 I would answer it this way. I would say that that  
9 hypothetical presents a much closer question. If the  
10 contract merely had a subrogation provision that said  
11 we are subrogated and the plan went in and tried to  
12 enforce that provision by employing equitable  
13 principles, seeking equitable remedies, that would be a  
14 closer question. That might be permissible under  
15 502(a)(3). That's not what occurred here.

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

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

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



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

6 JUSTICE GINSBURG: How does the -- how does  
7 the insurer show that if the parties could just say --  
8 the plaintiff can say, I am the master of my complaint.

9 I am not seeking damages for medical expenses. I just  
10 want damages for lost earnings, pain and suffering.

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

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

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

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

19 MR. STRIS: Well --

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

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

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

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

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

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

23           CHIEF JUSTICE ROBERTS: Thank you, Mr. Stris.

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

25           ORAL ARGUMENT OF GREGORY S. COLEMAN

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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

1 allow it, subject to the make-whole doctrine.

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

10 This type of a claim is a fundamentally  
11 equitable claim. When we pay over the medical  
12 expenses, we obtain a right in equity to receive an  
13 amount up to that which we have provided to the  
14 Petitioner. Our plan reflects that language. Our plan  
15 also goes on to say that it contains a commitment that  
16 we will look only to the recovery, to the fund that is  
17 received from a third party by settlement or judgment.

18 We think that that fits clearly within the language of  
19 Barnes, that we are committing ourselves to a recovery  
20 that will look only to the fund that is recovered.

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

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

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

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

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

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

18 JUSTICE KENNEDY: For your answer.

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

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

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

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

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

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

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

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

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

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

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



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

3 JUSTICE STEVENS: Well, are you -- do you  
4 contend it's always applied first to the medical  
5 damages? In other words, supposing there was --  
6 instead of the \$750,000 settlement, it had been  
7 \$100,000 here. \$75,000 was medical, and they had a lot  
8 of substantial other claims, pain, suffering, loss of  
9 earnings, and so forth. Would you always get your full  
10 amount if -- if the amount of the settlement is over  
11 the amount of the medical expense?

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

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

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

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

1     only gets 20 -- 20 cents?

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

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

6             MR. COLEMAN:  It is because --

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

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Counsel, it seems to  
24 me you -- you must be biting your -- your tongue here.

25 There's an easy answer to Justice Stevens and to

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

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

20 JUSTICE BREYER: What do you think --

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

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

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

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

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

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

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

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

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

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

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

16 MR. COLEMAN: Yes, Your Honor.

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

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

21 JUSTICE SCALIA: Congress said that.

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

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

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

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

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

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

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

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

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

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

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

13 I can envision circumstances --

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

17 MR. COLEMAN: Yes, absolutely.

18 JUSTICE SOUTER: Okay.

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

25 MR. COLEMAN: Then, Justice Ginsburg, we



1 would test the language at the end of Great-West and we  
2 would have to go after a different defendant. And we  
3 would -- we would have to test our luck under that type  
4 of situation, go after the person in possession or  
5 control of the funds, and we would be able to do that.

6 And we believe that courts would -- would allow that  
7 and would enforce our equitable rights in that type of  
8 a situation. I don't mean --

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

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

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

17 MR. COLEMAN: I think that our --

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

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

25 JUSTICE SCALIA: Or you might try to get

1 ERISA amended.

2 (Laughter.)

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

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

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

1 on what exists in equity, separate from the plan.

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

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

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

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

7 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
8 Coleman.

9 Mr. Feldman.

10 ORAL ARGUMENT OF JAMES A. FELDMAN

11 ON BEHALF OF THE UNITED STATES,

12 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

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

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

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

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

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

1 its equitable liens that were created by contract.

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

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

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

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

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

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

8 MR. FELDMAN: Right. It is --

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

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

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

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

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

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

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

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



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

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

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

19 But insofar as where you're going on to that  
20 further -- because this case can be just answered by  
21 saying, yes, there's a cause of action under 502(a)(3).

22 Now, insofar as the Court goes further into the make-  
23 whole doctrine, I think generally courts should --  
24 courts have recognized that under ERISA what they're  
25 supposed to do is enforce the terms of the plan.

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

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

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

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

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

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

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

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

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

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

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

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

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
15 Feldman.

16 Mr. Stris, you have 3 minutes remaining.

17 REBUTTAL ARGUMENT OF PETER K. STRIS

18 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

1 that by suggesting that, no, it's equitable because  
2 this was a pre-allocation of how the money would be  
3 distributed. Well, where I'm sitting, that looks an  
4 awful like a liquidated damages provision for a breach  
5 of contract. And there's nothing wrong with a  
6 liquidated damages provision, but this Court has  
7 squarely held that that's legal relief when it's for a  
8 breach of contract. It's prohibited by section  
9 502(a)(3).

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

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

1 equitable lien by assignment. That clearly bars legal  
2 relief.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr. Stris.

5 The case is submitted.

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

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