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ERISA's Casualties: Former Employees Duped into Early Retirement - With Friends Like ERISA Who Needs Enemies?

ERISA'S CASUALTIES: FORMER EMPLOYEES DUPED INTO EARLY RETIREMENT—WITH FRIENDS LIKE ERISA WHO NEEDS ENEMIES?

INTRODUCTION

The Employee Retirement Income Security Act of 1974 (“ERISA”)¹ is a federal statutory scheme that regulates most voluntary group pension and health plans in private industry.² One of the main purposes of ERISA is to “promote the interests of employees and their beneficiaries in employment benefit plans”³ and protect against private sector mismanagement of employee benefit plans.⁴

However, ERISA provides only limited remedies compared to previously available state law remedies.⁵ Essentially, ERISA permits the recovery of benefits and possible attorney fees, but does not allow for extra contractual or punitive damages, and precludes a trial by jury.⁶ As construed, this comprehensive scheme, enacted for the benefit of employees, has turned out to shield employers and insurers more than those it was designed to protect.⁷ In one commentator’s opinion, Congress must have been “asleep at the switch” when it stated that “ERISA’s predominant purpose is to be the protection of the rights of beneficiaries of medical and retirement plans while simultaneously eliminating traditional remedies.”⁸

This article discusses the split among eight circuits as to the treatment of a particular class of ERISA claimants who sometimes lack even the limited remedies available under ERISA – former employees who

1. 29 U.S.C. §§ 1001–1461 (2000).

2. U.S. Dep’t of Labor, Health Plans & Benefits, Employee Retirement Income Security Act – ERISA, <http://www.dol.gov/dol/topic/health-plans/erisa.htm> (last visited Jan. 18, 2006); ERISA covers both employee pension plans and employee welfare plans. 29 U.S.C. § 1002(1)–(3) (2000).

3. Ryan W. Greene, *The Evolving Standard for ERISA Preemption of State Law Under Recent United States Supreme Court Precedent*, FIND LAW, July 1, 1999, <http://library.findlaw.com/1999/Jul/1/126249.html>. More than 85% of American workers have private health insurance plans that are affected by ERISA. *Id.*

4. *Id.* (noting that in 1963 when the Studebaker Automotive plant closed its doors, it left over 10,000 employees without pension benefits because the plan was inadequately funded).

5. Hon. William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 CUMB. L. REV. 285, 287, 295 (1998) (noting that extra-contractual damages and jury trials are unavailable under ERISA); see *Drinkwater v. Metro. Life Ins. Co.*, 846 F.2d 821, 825 (1st Cir. 1988); *Blake v. Unionmutual Stock Life Ins. Co. of Am.*, 906 F.2d 1525, 1526 (11th Cir. 1990).

6. Acker, *supra* note 5, at 295 (noting that since Congress did not mention whether disputes were to be resolved by a jury or judge, this left the courts to decide whether jury trials are appropriate in ERISA actions, the courts have determined that they are not available); see, e.g., *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1158 (10th Cir. 1998).

7. Acker, *supra* note 5, at 287 (noting that the “real beneficiaries of ERISA, if any, turn out to be the fiduciaries, the administrators, the employers and the insurers.”).

8. *Id.* at 295.

claim that their termination was fraudulently induced to deprive them of more valuable benefits than had they remained employed. Five circuits avoid the prospect of a remediless wrong by allowing the “but for” test for standing under ERISA,⁹ while the other three preclude defrauded retirees from seeking redress based on claims of fraudulent inducement into early retirement with inferior benefits.¹⁰

Part I of this article offers a general background as to the purpose of ERISA and an interpretation of its two forms of preemption: conflict and complete. Part II discusses the split among the circuits as to the issue of standing for former employees to sue under ERISA, and how the Tenth Circuit has sided in its recent decision of *Felix v. Lucent Technologies, Inc.*¹¹ Part III addresses the Tenth Circuit’s *Felix* decision and its reasoning for siding with the minority view. Part IV addresses the lack of remedies for former employees and suggests what Congress and the Supreme Court might do to make ERISA more true to its original purpose. This article concludes by underscoring the particular unfairness to former employees and no doubt unintended benefits to employers who mistreat their workers.

I. GENERAL BACKGROUND

“Congress enacted ERISA to ‘protect . . . the interests of participants in employee benefit plans and their beneficiaries’ by setting out substantive regulatory requirements for employee benefit plans and ‘to provide for appropriate remedies, sanctions, and ready access to the Federal courts.’”¹² The central purpose of ERISA is to provide a “uniform regulatory” scheme covering employee pension and welfare plans.¹³ Toward that end, ERISA includes expansive conflict preemption provisions “to ensure that employee benefit plan regulation would be ‘exclusively a federal concern.’”¹⁴ As construed, ERISA provides the sole remedy for those with standing to sue under it.¹⁵ ERISA involves two preemption provisions¹⁶ and the distinction between the concept of com-

9. *Felix v. Lucent Tech. Inc.*, 387 F.3d 1146, 1159 (10th Cir. 2004) (stating the First, Second, Fifth, Sixth, and Eighth Circuits allow former employees to gain standing to sue under ERISA while using a “but for” test for standing); *see also* *Adamson v. Armco Inc.*, 44 F.3d 650, 654–55 (8th Cir. 1995); *Swinney v. Gen. Motors Corp.*, 46 F.3d 512, 518–19 (6th Cir. 1995); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 667–68 (2d Cir. 1994); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702–03 (1st Cir. 1994); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1220–21 (5th Cir. 1992).

10. *Felix*, 387 F.3d at 1159; *see also* *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1535 (10th Cir. 1993); *Sanson v. Gen. Motors Corp.*, 966 F.2d 618, 619 (11th Cir. 1992); *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 466 (10th Cir. 1990); *Santon v. Gulf Oil Corp.*, 792 F.2d 432, 433 (4th Cir. 1986).

11. 387 F.3d 1146 (10th Cir. 2005).

12. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (citing 29 U.S.C. § 1001(b) (2000)).

13. *Aetna Health*, 542 U.S. at 208.

14. *Id.* (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)).

15. *Id.* at 208–209.

16. *Felix v. Lucent Tech. Inc.*, 387 F.3d 1146, 1153–54 (10th Cir. 2004).

plete preemption under Section 502(a) and Section 514's "conflict preemption" is critical to understanding courts' application of the preemption doctrine.¹⁷

Judicial construction of available remedies has resulted in very limited remedies for claims subject to ERISA. While many courts have recognized this injustice, they profess helplessness to do anything about it.¹⁸ Contrary to ERISA's original purpose, it has become an "impenetrable shield[] that insulate[s] plan sponsors from any meaningful liability for negligent or malfeasant acts committed against plan beneficiaries."¹⁹ Ironically, the courts that interpret this statute are exempt from ERISA.²⁰

Judges have been decrying the restriction of available remedies and lack of deterrents to misbehaving insurers and employers, but they do no more than appeal to Congress to restrain the law.²¹ In the Ninth Circuit's *Olson v. General Dynamics Corp.*,²² Judge Reinhardt, recognizing that ERISA preempted plaintiff's state law claims, found the plaintiff's lack of a federal or state remedy unfortunate.²³ Judge Reinhardt noted that prior to the passage of ERISA, the plaintiff would have been entitled to state remedies for his fraud and misrepresentation claims; unfortunately, his lack of remedy is not unique.²⁴

More recently, in *Aetna Health Inc. v. Davila*,²⁵ the United States Supreme Court held that the respondent's state claims fell within the scope of Section 502(a) of ERISA, and therefore were completely preempted, justifying removal to federal court.²⁶ Justice Ginsburg notes with concern that "virtually all state remedies are preempted," and since very few federal remedies are available, a "regulatory vacuum exists."²⁷ However, Congress has taken no action.

17. *Id.*

18. See *Olson v. Gen. Dynamics Corp.*, 960 F.2d 1418, 1423-25 (9th Cir. 1991) (Reinhardt, J., concurring); *Aetna Health*, 542 U.S. at 222 (Ginsburg & Breyer, JJ., concurring).

19. *Difelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 456 (3d Cir. 2003) (Becker, J., concurring).

20. "The provisions of this [title] [ERISA] shall not apply to any employee benefit plan if . . . a governmental plan . . . or a church plan." 29 U.S.C. § 1003(b)(1)-(2) (2000); see 29 U.S.C. § 1002(32)-(33) (2000).

21. See *Sanson* 966 F.2d at 623 (Birch, J., dissenting); *Difelice*, 346 F.3d at 452; *Aetna Health*, 542 U.S. at 222.

22. 960 F.2d 1418 (9th Cir. 1991).

23. *Olson*, 960 F.2d at 1423.

24. *Id.*

25. 542 U.S. 200 (2004).

26. *Aetna Health*, 542 U.S. at 222.

27. *Id.*

A. Section 514²⁸ Conflict Preemption Under ERISA

Section 514 provides in pertinent part that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan covered by ERISA.”²⁹ A State law relates to an ERISA plan “if it has a connection with or reference to such a plan”³⁰ and is therefore preempted unless it falls within an exception of Section 514.³¹ This broadly-worded provision has been repeatedly observed as “clearly expansive” by the Supreme Court,³² stretching and contracting like a rubber band.³³ However, the Court has also simultaneously recognized that the “term ‘relate to’ cannot be . . . ‘extend[ed] to the furthest stretch of its indeterminacy’ or else ‘for all practical purposes preemption will never run its course.’”³⁴ Essentially, preemption means “that once state remedies are eliminated, ERISA provides the only remedy, which is either a pallid remedy or no remedy.”³⁵

Judge Becker of the Third Circuit has taken notice of the mischief that ERISA’s broad preemption brings, noting that:

Lower courts have struggled to maintain some semblance of equity notwithstanding the enormous breadth of the preemption test . . . the price of all this has been descent into a Serbonian bog wherein judges are forced to don logical blinders and split the linguistic atom to decide even the most routine cases.³⁶

ERISA remedies pale in comparison to state law claims that are now preempted for relating to a plan.³⁷ Courts, in determining whether a State law is related to ERISA, and is thus preempted, look to the objectives of ERISA and the nature and effect the state law has on the ERISA plans.³⁸

This type of federal preemption under Section 514 is a defense and cannot by itself establish federal question jurisdiction. Thus, it is not sufficient to authorize removal to the federal court system.³⁹ On the other

28. 29 U.S.C. § 1144 (2000).

29. *Egelhoff v. Egelhoff*, 532 U.S. 141, 141 (2001).

30. *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)).

31. Some courts have recognized an exception to Section 514 ERISA conflict preemption occurs when the “state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.” *Felix*, 387 F.3d at 1154.

32. *Id.* at 1153.

33. Acker, *supra* note 5, at 289 (noting that “[a] survey of cases indicates that the words ‘relate to’ stretch and contract like a rubber band”).

34. *Felix*, 387 F.3d at 1153 (citing *Eglehoff*, 532 U.S. at 146).

35. Acker, *supra* note 5, at 287 (calling ERISA preemption “super duper preemption” because ERISA affords plaintiffs either pallid remedies or no remedies).

36. *Difelice*, 346 F.3d at 454. “A Serbonian bog is a mess from which there is no way of extricating oneself.” *Id.* at 454 n.1.

37. Jayne E. Zanglein, *Closing the Gap: Safeguarding Participants’ Rights by Expanding the Federal Common Law of ERISA*, 72 WASH. U. L.Q. 671, 671 (1994).

38. *Egelhoff*, 532 U.S. at 147.

39. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

hand, Section 502(a),⁴⁰ as discussed below, provides a civil enforcement cause of action that completely preempts a state cause of action seeking the same relief.⁴¹ Thus, a claim falling within the scope of 502(a) presents a federal question providing grounds for removal.⁴² If the plaintiff moves to remand, the defendant will only need to show a substantial federal claim.⁴³

B. Section 502(a) Complete Preemption under ERISA

The preemptive reach of ERISA's civil enforcement provision, Section 502(a), is powerful.⁴⁴ When state laws are preempted under Section 514, remedies may be available under Section 502(a).⁴⁵ ERISA provides a federal cause of action under Section 502(a) which contains six subsections that determine who can bring a civil action.⁴⁶ In *Metropolitan Life v. Taylor*,⁴⁷ the Court held that ERISA Section 502(a) converts state causes of action into federal claims "for the purposes of determining the propriety of removal."⁴⁸ ERISA's civil enforcement mechanism has "extraordinary preemptive power" that "converts an ordinary state common law complaint into one stating a federal claim as an exception to the well-pleaded complaint rule."⁴⁹ Claims falling within the scope of ERISA Section 502(a) are thus removable to federal court.⁵⁰

Defendants (employers, administrators, or fiduciaries) want ERISA to govern the claims against them because of ERISA's severely limited or absent remedies.⁵¹ However, the plaintiff-employee would rather proceed under a state law theory that "provides what ERISA was supposed to provide."⁵² When complete preemption does not apply, federal district

40. 29 U.S.C. § 1132(a) (2000).

41. *Giles v. Nylcare Health Plans, Inc.*, 172 F.3d 332, 336-37 (5th Cir. 1999). Section 502(a) provides a cause of action to any plan beneficiary or participant to recover benefits due under the terms of the pension plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan. 29 U.S.C. § 1132(a) (2000).

42. *Giles*, 172 F.3d at 337. The Court further expanded the doctrine of complete preemption in *Aetna Health Inc. v. Davila*, stating "where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls 'within the scope of' ERISA § 502(a)(1)(B) . . . then the individual's cause of action is completely preempted by ERISA § 502(a)(1)(B)." *Felix*, 387 F.3d at 1155 (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004)).

43. *Giles*, 172 F.3d at 337.

44. Section 502(a) provides a cause of action to any plan beneficiary or participant to recover benefits due under the terms of the pension plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan. 29 U.S.C. § 1132(a) (2000).

45. Remedies available under ERISA are liquidated damages, benefits owed to the participant under the terms of the plan, enforcement of rights under the plan, to clarify future benefits, equitable relief, and to enforce provisions of the plan. 29 U.S.C. § 1132(a).

46. 29 U.S.C. § 1132(a).

47. 481 U.S. 58 (1987).

48. *Aetna Health*, 542 U.S. at 201; *see also* *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968).

49. *Aetna Health*, 542 U.S. at 209 (quoting *Metro. Life*, 481 U.S. at 65-66).

50. *Metro. Life*, 481 U.S. at 66; *Giles*, 172 F.3d at 337.

51. *Acker*, *supra* note 5, at 287.

52. *Id.*

courts are without removal jurisdiction.⁵³ Therefore, they cannot resolve any dispute regarding conflict preemption, and must remand to state court, where the preemption issue can be determined.⁵⁴ It is likely the court will dismiss state law claims under Section 514. In a diversity action, the federal court could determine that there was no complete preemption under Section 502(a), and then also dismiss state law claims as preempted by Section 514.⁵⁵

II. THE CIRCUIT SPLIT ON FORMER EMPLOYEE ERISA STANDING

The split among the circuits appears to rest principally upon their interpretations of the Supreme Court's discussion of who is a "participant" with standing to sue under ERISA in *Firestone Tire & Rubber Co. v. Birch*.⁵⁶ A plaintiff must be within the statutory definition of "participant" to fall within the scope of Section 502(a)(1) – (3), in order to bring a suit under ERISA.⁵⁷ Former employees must qualify as participants to file suit for fraudulent inducement into early retirement, in hopes of restoring the benefits they would have been entitled to.⁵⁸ In *Firestone*, the Court observed that a former employee can only gain participant standing if they have a "reasonable expectation of returning to covered employment or who have a colorable claim to vested benefits"⁵⁹

The majority of circuits have interpreted *Firestone* broadly, not as the only way for a plaintiff to have standing to sue, but as one avenue.⁶⁰ Looking at congressional intent and the original purposes of ERISA, the majority of circuits feel that a grave injustice would be served if *Firestone* were narrowly interpreted as the only way a plaintiff could be a participant.⁶¹ In contrast, the minority circuits narrowly interpret *Firestone* to hold that participant status is both a question of subject matter jurisdiction and standing, finding that Section 502 gives the court jurisdiction only if plaintiff's standing as participant is as defined in *Firestone*.⁶²

53. *Felix*, 387 F.3d at 1158.

54. *Id.*; see also *Metro. Life*, 481 U.S. at 63 (noting that a state cause of action that is preempted by ERISA and within the scope of 502(a) of ERISA might fall within the *Avco* rule); *Warner v. Ford Motor Co.*, 46 F.3d 531, 534 (6th Cir. 1995) (holding that Section 514 does not create a federal cause of action itself); *Giles*, 172 F.3d at 336 (holding that state claims that are not within the scope of 502(a), even if preempted are not removable).

55. 28 U.S.C. § 1332 (2000).

56. 489 U.S. 101 (1989).

57. See *Firestone*, 489 U.S. at 117–18; see 29 U.S.C. §§ 1132(a)(1)–(6) (2000).

58. *Felix*, 387 F.3d at 1158.

59. *Firestone*, 489 U.S. at 117 (internal quotes omitted) (quoting *Saladino v. I.L.G.W.U. Nat'l Ret. Fund*, 754 F.2d 473, 476 (2d Cir. 1985)).

60. See, e.g., *Swinney v. Gen. Motors Corp.*, 46 F.3d 512, 518 (6th Cir. 1995).

61. See *Swinney*, 46 F.3d at 518; *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir. 1992).

62. See *Felix*, 387 F.3d at 1160 n. 14 (holding that the "requirement of [section] 502 is 'both a standing and a subject matter jurisdictional requirement.'" (citing *Santon v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986)); see also *Miller v. Rite Aid Corp.*, 334 F.3d 335, 340 (3d Cir. 2003).

As former employees who are voluntarily terminated from their employment based on their employer's and plan administrator's misrepresentations, they cannot achieve participant standing under ERISA to file a claim.⁶³ Since the plaintiffs are no longer employees, they cannot recover for benefits owed to them or enforce their rights under the plan, nor do they have any right to future benefits.⁶⁴ Therefore, to recover benefits that they would have received had they not been fraudulently induced into retirement, they must achieve participant status via another avenue.⁶⁵ A "but for" test for standing has been accepted by the majority of circuits.⁶⁶ This test is based upon the theory that "but for" the defendant's wrongful actions, the plaintiffs would have still been participants under the plan.⁶⁷ However, circuits are split over whether plaintiffs have standing to bring a cause of action under ERISA by making a "but for" claim.⁶⁸

A. The Majority View: Fraud Confers "But For" Test for Standing Under ERISA

Five circuits now permit former employees to sue under ERISA, if plaintiffs can make a "but for" claim for standing through allegations of premature termination of employment induced by employer fraud.⁶⁹

In *Christopher v. Mobil Oil Corp.*,⁷⁰ the plaintiff was unable to achieve standing to sue because he could not show a colorable claim for vested benefits or a reasonable expectation of returning to covered employment.⁷¹ The Fifth Circuit felt that *Firestone* could not "reduce the standing question to a straightforward formula applicable in all cases."⁷² It added, "[this] seems particularly so in cases involving allegations of discharge."⁷³ Rather, the court observed, "it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee would be a current employee with a reasonable expectation of receiving benefits"⁷⁴

63. *Felix*, 387 F.3d at 1159.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (noting the Fourth, Eleventh, and Tenth Circuits are in the minority and have rejected the "but for" exception in determining participant standing).

69. *Felix*, 387 F.3d at 1159 (noting that the "First, Second, Fifth, Sixth, and Eight Circuits have held that former employees may sue under ERISA if they make a 'but for' claim of this sort").

70. 950 F.2d 1209 (5th Cir. 1992) (dealing with the issue of former employees who claimed deprivation of benefits through fraudulent inducement to retire).

71. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir. 1992); see *Firestone*, 489 U.S. at 101.

72. *Christopher*, 950 F.2d at 1221.

73. *Id.*

74. *Id.*

In *Vartanian v. Monsanto Co.*,⁷⁵ the First Circuit held that former employees have standing to sue under ERISA if they can show that "but for" their employer's wrongful conduct, they would have been a participant for purposes of standing.⁷⁶ The *Vartanian* court held that an employee who was denied a reasonable opportunity to make an informed decision about when to retire, as a result of his supervisor's misrepresentations and the fact that he received benefits, could not "be used to deprive him of 'participant' status"⁷⁷ Determining that the former employee had standing to sue under ERISA, the First Circuit notes that the Supreme Court's discussion of *Firestone* states that the "term 'participant' was developed outside of the 'standing' context and therefore, does not mandate a finding" that one who is not a participant because no longer employed, has no standing to seek relief.⁷⁸

Examining the legislative history of ERISA, the *Vartanian* court noted Congress' intent that the federal courts would "construe the Act's jurisdictional requirements broadly in order to facilitate enforcement of its remedial provisions"⁷⁹ To find that the plaintiff lacked standing to sue under ERISA would "frustrate Congress's intention to remove jurisdictional and procedural obstacles to such claims," and deprive an employee of standing "even where the employer's breach of fiduciary duty takes the form of misrepresentations that induced the employee to retire and receive the payment of benefits."⁸⁰

The Second Circuit, in *Mullins v. Pfizer, Inc.*,⁸¹ following the view of the First and Fifth Circuits, adopted this same exception in the case of former employees.⁸² The court held that it was "more consistent with legislative intent to afford standing in the present context[,] and furthermore, that to "hold otherwise would have the anomalous effect of allowing a fiduciary 'through its own malfeasance to defeat the employee's standing."⁸³

75. 14 F.3d 697 (1st Cir. 1994).

76. *Vartanian*, 14 F.3d at 702.

77. *Id.* at 703.

78. *Id.* at 701 (citing *Christopher*, 950 F.2d at 1221 ("*Firestone* . . . [cannot] be read to reduce the standing question to a straightforward formula applicable in all cases.")).

79. *Id.* at 702 (noting that "[t]he enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of the [Act].") (citing S. REP. NO. 93-127, at 3 (1974), as reprinted in 1974 U.S.C.C.A.N. 4639, 4871).

80. *Id.* (noting that a holding like this "would enable an employer to defeat the employee's rights to sue for a breach of fiduciary duty by keeping his breach a well guarded secret until the employee receives his benefits or, by distributing a lump sum . . . before the employee can file suit.").

81. 23 F.3d 663 (2d Cir. 1994).

82. *Mullins*, 23 F.3d at 668. The former employee in *Mullins* voluntarily retired because of material misrepresentations by his plan administrator. *Id.* at 665.

83. *Id.* at 668 (agreeing with the First Circuit in its determination that the "basic standing issue is whether the plaintiff is 'within the zone of interests ERISA was intended to protect[.]'").

The Eighth Circuit joined the majority view in *Adamson v. Armco, Inc.*⁸⁴ The Eighth Circuit recognized the plaintiff's standing when "'but for the employer's conduct alleged to be in violation of ERISA,' the employee or former employee would be a plan participant."⁸⁵

In *Swinney v. General Motors, Corp.*,⁸⁶ the Sixth Circuit held that "so long as a former employee would have been in a class eligible to become a member of the plan but for the fiduciary's alleged breach of duty, he 'may become eligible' for benefits under the plan and is therefore a 'participant' . . . for the purposes of standing."⁸⁷

Acknowledging the Tenth and Fourth Circuit holdings that a "person who terminates his right to belong to a plan cannot be a 'participant' in the plan,"⁸⁸ the *Swinney* court adhered to the proposition that ERISA was not intended to allow a "fiduciary to circumvent his ERISA-imposed fiduciary duty in this manner."⁸⁹ The *Swinney* court also found that in rejecting the "but for" tests for standing, the minority courts interpret the Supreme Court's *Firestone* decision "too strictly,"⁹⁰ observing that while *Firestone*, although it provides guidance, "is not necessarily dispositive."⁹¹

B. The Minority View Rejects "But For" Test for Standing

The Tenth Circuit is illustrative of the minority view, rejecting the "but for" claim and requiring former employees to have either an expectation of returning to covered employment, or a "colorable claim to vested benefits" to achieve participant status under the statute.⁹² The Tenth Circuit's reasoning in its earlier decisions of *Mitchell v. Mobil Oil Corp.*⁹³ and *Raymond v. Mobil Oil Corp.*⁹⁴ foretold its rejection of the "but for" exception. The court found the early retiree in *Mitchell* without participant standing under ERISA Section 502(a), reversing the jury's finding of fraud and damages awarded.⁹⁵ The court held that the definition of "participant" does not include former employees who received a

84. 44 F.3d 650, 654-55 (8th Cir. 1995) (adopting this exception in *Howe v. Varsity Corp.*, 36 F.3d 746 (8th Cir. 1994)).

85. *Adamson*, 44 F.3d at 654.

86. 46 F.3d 512 (6th Cir. 1995).

87. *Swinney*, 46 F.3d at 519.

88. *Id.* at 518 (recognizing that without this exception a "fiduciary could defeat an employee's standing to bring an ERISA action by duping him into giving up his right to participate in the plan").

89. *Id.* at 519.

90. *Id.* (reemphasizing that *Firestone* should not be interpreted to "reduce the standing question to a straightforward formula").

91. *Id.* at 518.

92. *Felix*, 387 F.3d at 1159.

93. 896 F.2d 463 (10th Cir. 1990).

94. 983 F.2d 1528 (10th Cir. 1993).

95. *Mitchell*, 896 F.2d at 474. The Tenth Circuit set aside a jury verdict of "\$405,962.76 in back-pay damages; \$86,000 as compensation for the 20% reduction in Mr. Mitchell's lump-sum benefit; and, \$96,740.82 in front-pay damages." *Id.* at 466.

lump-sum payment of all that had vested at the time they left covered employment.⁹⁶

While *Mitchell* did not specifically reject a "but for" test, it rejected a very similar argument—"that Mobil's violation of ERISA entitled [him] to additional benefits which he would have received had Mobil's [misrepresentations regarding the] amendments to the Plan not compelled him to retire [early]."⁹⁷ The *Mitchell* court determined that, notwithstanding the fraudulent conduct of the defendant, the plaintiff lacked standing to sue under ERISA because he did not have a colorable claim to vested benefits, and had neither sought reinstatement nor had expectations of returning to covered employment.⁹⁸

Following *Mitchell*, the *Raymond* court determined that Raymond had no claim for vested benefits because he had received all plan benefits to which he was entitled at the time of retirement. Therefore, Raymond lacked standing to sue under ERISA, regardless of the wrongdoings of his employer.⁹⁹ In its holding, the court stated, "[t]o say that but for Mobil's conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely *claim* to be participants to be deemed as such."¹⁰⁰

In the Eleventh Circuit's *Sanson v. General Motors Corp.*,¹⁰¹ the plaintiff argued that "but for" GM's fraudulent misrepresentations, he would have continued his employment and therefore should be considered a participant with standing to sue under ERISA.¹⁰² The *Sanson* court held that the alleged fraudulent misrepresentations related to Sanson's retirement benefits available under GM's plan, and therefore were preempted under Section 514.¹⁰³ Because the plaintiff did not satisfy ERISA's definition of participant, he had no claim under it either, regardless of whether or not a remedy would be available.¹⁰⁴

In *Stanton v. Gulf Oil Corp.*,¹⁰⁵ the Fourth Circuit, in its rejection of the "but for" exception, held that the effect of allowing a "but for" test would be to "impose participant status on every single employee who *but for* some future contingency may become eligible."¹⁰⁶ The court noted

96. *Id.* at 474.

97. *Felix*, 387 F.3d at 1160 n.13 (quoting *Mitchell*, 896 F.2d at 474).

98. *Id.*

99. *See Raymond*, 983 F.2d at 1531, 1533.

100. *Felix*, 387 F.3d at 1160 (quoting *Raymond*, 983 F.2d at 1536).

101. 966 F.2d 618 (11th Cir. 1992).

102. *Sanson*, 966 F.2d at 619.

103. *Id.* at 621.

104. *Id.* (relying on a restrictive interpretation of 502(a)). In *Pilot Life*, the Court stated that an inadequate remedy under ERISA is an insufficient reason to overcome the express language of the statute. *Id.* at 622.

105. 792 F.2d 432 (4th Cir. 1986).

106. *Stanton*, 792 F.2d at 435 (stating that "[n]either caselaw nor other provision of ERISA supports such a reading of 'participant[.]'").

that neither case law nor ERISA supported such an interpretation of “participant,” holding that the protections of ERISA are tied to current participants only.¹⁰⁷

In rejecting a “but for” test for standing, the minority circuits leave plaintiffs without a remedy at both the state and federal level.¹⁰⁸ Lacking participant status, plaintiffs will not be permitted to bring an ERISA claim, and at the same time, will find their state law claims preempted because they are “related to” their plan.

III. ERISA, COMPLETE PREEMPTION, AND *FELIX V. LUCENT TECHNOLOGIES, INC.*¹⁰⁹

In *Felix v. Lucent Technologies, Inc.*, the Tenth Circuit unquestionably rejected the concept of a “but for” test for standing that allows former employees to file suit under ERISA as participants. As discussed below, this decision may leave former employees without a remedy in either state or federal court.

A. Facts

Plaintiff Aaron Felix worked for Lucent Technologies’ Oklahoma City Works (“OKCW”) manufacturing facility.¹¹⁰ Lucent decided to sell its manufacturing facilities, including OKCW, or merge them with similar companies.¹¹¹ On February 19, 2001, Lucent offered, pursuant to a memorandum agreement with The International Brotherhood of Electrical Workers (“IBEW”), a new benefits package to its retirement-eligible employees who elected to retire early—a payment equal to 110% of their termination allowance, plus a “special pension benefit” of \$11,000.¹¹² For those employees who were not retirement-eligible, Lucent offered to “provide a transactional leave of absence by adding five years to the age and/or service to make the employee pension-eligible”¹¹³ Any employees who wished to accept this offer had to do so by May 29, 2001, and leave employment on June 30, 2001.¹¹⁴ On several occasions, Lucent representatives stated that this offer was a “one-time, non-

107. *Id.*

108. *See, e.g., Raymond*, 983 F.2d at 1531, 1533; *Sanson*, 966 F.2d at 621; *Mitchell*, 896 F.2d at 474; *Stanton*, 792 F.2d at 435.

109. 387 F.3d 1146 (10th Cir. 2005).

110. *Felix*, 387 F.3d at 1151–52.

111. *Id.* at 1151.

112. *Id.* (desiring to make OKCW more attractive to prospective buyers or merging companies, Lucent decided to reduce the number of its long-term employees; \$11,000 represents the amount the employee was entitled to under a pending National Labor Relations Board award against Lucent).

113. *Id.*

114. *Id.* Lucent distributed written material and held many meetings at OKCW during which Lucent representatives outlined the benefits being offered. *Id.*

negotiable, final offer that was a take-it-or-leave it proposal” and that there would be no additional offers of any additional benefits.¹¹⁵

In reliance upon the representations that this was a “take-it-or-leave-it” one-time offer and that delaying retirement “would not gain the employee[s] additional benefits” in the future, Felix and over one thousand other eligible employees accepted the offer and retired effective June 30, 2001.¹¹⁶ Subsequently, Celestica, Inc. agreed to take over the operations of OKCW and hire its remaining employees on November 30, 2001. Contrary to the representations Lucent had made prior to May 29, 2001, Lucent offered a new benefits package to retirement eligible employees on October 1, 2001.¹¹⁷ This package was identical to the previous offer with one exception: it contained an additional payment of a “special one-time pension benefit” of \$15,000.¹¹⁸

Plaintiffs brought a class action suit in state court for fraud claiming that they relied on Lucent’s intentional misrepresentations that encouraged Plaintiffs to retire early and accept the lower benefits package.¹¹⁹ In making the decision to retire early, they had no opportunity to discover the truth regarding the misrepresentations until after they had received their vested benefits.¹²⁰ The Plaintiffs requested damages for the additional \$15,000 benefit that was later offered to retirement-eligible employees and the value of an additional year of service that was lost by accepting June 30, 2001 as a retirement date.¹²¹

Lucent removed the case to federal court under the complete preemption doctrine of Section 502 of ERISA¹²² and moved to dismiss for failure to state a claim.¹²³ Plaintiffs filed a motion to remand, asserting lack of complete preemption and, therefore, lack of federal question subject matter jurisdiction.¹²⁴ Plaintiffs, only seeking damages for state law fraud and not seeking an ERISA remedy, appealed.¹²⁵

115. *Id.* This was reiterated in a newsletter distributed by IBEW on Mar. 21, 2001, in which the union president flatly stated, “I assure you there will not be any additional incentives for retirement.” *Id.* at 1152.

116. *Id.* at 1152.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1150, 1152.

121. *Id.* at 1152. (alleging that a “significant number of plaintiffs with a short time to their respective anniversary dates lost an additional year of service by accepting the June 30th retirement date.” Arguing each year was worth approximately \$4,000 in the “special pension payment plus a reduction in the amount of the respective pension over the life of each pension”). *Id.* at 1152 n.3.

122. *Id.* at 1150 (removing based on both ERISA and the Labor Management Relations Act (“LMRA”)).

123. *Id.*

124. *Id.* at 1152.

125. *Id.* at 1150 (appealing only the motion to dismiss not the motion to remand).

B. Tenth Circuit's Analysis

The appeal focused on the issue of whether the Plaintiffs' state law claims fell within the scope of Section 502(a) and were therefore completely preempted, thereby justifying removal.¹²⁶

To exercise proper removal jurisdiction under Section 502 of ERISA, it must be determined that the Plaintiffs have standing as a "participant or beneficiary" under the terms of their plan, in order to enforce their rights under the plan.¹²⁷ ERISA defines participant in pertinent part as: "[A]ny employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer."¹²⁸

Interpreting this definition in *Firestone Tire & Rubber Co. v. Bruch*,¹²⁹ the Supreme Court held that a former employee participant must show a "colorable claim to vested benefits" or an expectation to return to covered employment and fulfill eligibility requirements.¹³⁰ The Court defined "'colorable claim' to vested benefits" as including situations where: (1) the plaintiff will "prevail in a suit for benefits," or (2) fulfill eligibility requirements in the future.¹³¹

The *Felix* plaintiffs did not contend that they were entitled to additional benefits under their plan.¹³² They argued instead that they were "fraudulently induced to take early retirement," and sought money damages from their former employer (the difference in benefits received and those that would have been received had they not been duped into retiring when they did).¹³³ The *Felix* court held that because Plaintiffs were not claiming that they were (or were likely to become) eligible for additional benefits under the terms of their plan, or that vested benefits were improperly withheld, but rather asked for damages based on their employer's fraud, their state law fraud claims did not fall within Section 502(a).¹³⁴ Therefore, the Tenth Circuit panel held that under the well-pleaded complaint doctrine, preemption under Section 514, a defense to Plaintiffs' state law claims, alone will not support removal.¹³⁵

126. *Id.*

127. *Id.* (defining beneficiary as a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder"); see 29 U.S.C. § 1002(8) (2000).

128. 29 U.S.C. § 1002(7) (2000).

129. 489 U.S. 101 (1989).

130. *Felix*, 387 F.3d at 1159; see *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1533 (10th Cir. 1993).

131. *Firestone*, 489 U.S. at 117-18.

132. *Felix*, 387 F.3d at 1159.

133. *Id.*

134. *Id.* at 1162-63.

135. *Id.* at 1158.

In sum, the Court found that the *Felix* Plaintiffs lacked a “colorable claim for vested benefits,”¹³⁶ and had no reasonable expectation for returning to covered employment, because they did not seek reinstatement either by contractual right or theory.¹³⁷

C. The Tenth Circuit’s Rejection of the “But For” Test for Standing Under ERISA Leaves Open Uncomfortable Possibilities

Ironically, the Tenth Circuit’s rejection of Lucent’s argument of complete preemption¹³⁸ was to Lucent’s benefit.¹³⁹ The Tenth Circuit criticized the “but for” circuits as “mistakenly assum[ing] that [removal] jurisdiction depends only on the traditional notion of ‘standing,’” holding that the ability to sue under Section 502(a) involved “both standing and a subject matter jurisdictional requirement.”¹⁴⁰

The court also relied on its prior holdings in *Mitchell v. Mobil Oil Corp.*,¹⁴¹ *Raymond v. Mobil Oil Corp.*,¹⁴² and *Boren v. Southwestern Bell Telephone Co., Inc.*¹⁴³ Like those cases, the *Felix* plaintiffs received all plan benefits to which they were entitled at the time of their retirement and, therefore, had no “‘colorable claim’ that additional benefits had ‘vested’ or ‘will vest.’”¹⁴⁴ The court pointed out that in *Raymond*, it held that the “receipt of the full extent of [plaintiffs’] vested benefits’ was a crucial fact.”¹⁴⁵ Absent a claim for benefits, Plaintiffs are merely seeking damages based on their fraud and misrepresentation claims, not “vested benefits improperly withheld.”¹⁴⁶ To allow this “but for” test for ERISA standing, the court reasoned, would be tantamount to allowing those who “merely claim to be participants to be deemed as such.”¹⁴⁷ Having re-

136. *Id.*; see *Raymond*, 983 F.2d at 1536.

137. *Felix*, 387 F.3d at 1162.

138. *Id.* at 1159-61 (“but for [Lucent’s] wrongful actions, [Plaintiffs] would have been entitled to the additional benefits under the plan”)

139. *Id.* at 1159.

140. *Id.* at 1160 (noting the “‘express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties outlined in § 502’”) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 (1983)).

141. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir. 1990).

142. *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528 (10th Cir. 1993).

143. *Boren v. Southwestern Bell Telephone Co., Inc.*, 933 F.2d 891 (10th Cir. 1991); *Felix*, 387 F.3d at 1159.

144. *Felix*, 387 F.3d at 1160.

145. *Id.* (internal quotations omitted).

146. *Id.* (internal quotations omitted) (rejecting a “but for” test for ERISA standing when noting there is no controlling case law or statutory language that supports a “but for” exception “to find ERISA standing where plaintiff is not technically entitled to additional benefits under the pension plan”).

147. *Id.* Additionally, the court observed that its holdings in *Mitchell* and *Raymond* were consistent with its prior decision in *Boren*, 933 F.2d 891 (10th Cir. 1991) (holding improperly withheld vested benefits.) Following *Raymond* the court held that the plaintiff in *Alexander v. Anheuser-Busch Cos.* a former employee, who did not have a reasonable expectation of returning to his employment, would only have standing only if he could show a “colorable claim for vested benefits.” *Felix*, 387 F.3d at 1160. Because the plaintiff’s pre-existing medical condition was plainly excluded by his plan, he could not show that he had a colorable claim and, therefore, lacked standing to sue under ERISA. *Id.* (citing *Alexander*, 990 F.2d at 539 (10th Cir. 1993)).

jected this argument in both *Mitchell* and *Raymond*, the court refused it again.¹⁴⁸ Aware that this decision left open the “uncomfortable possibility” that plaintiffs, while lacking standing to sue under ERISA, may “be preempted in state court under [Section] 514 from asserting a state claim, leaving them with no remedy,” the court did not consider that outcome a concern of the federal judiciary, asserting that the “unavailability of a remedy under ERISA is not germane to a preemption analysis.”¹⁴⁹

IV. ANALYSIS

*Felix v. Lucent Technologies, Inc.*¹⁵⁰ is the latest decision in a trilogy of Tenth Circuit opinions that reject the “but for” test for standing under ERISA with regard to former employees fraudulently induced into early retirement.¹⁵¹ As a result, these former employees who lack standing to sue under ERISA Section 502(a) may find their state claims preempted under Section 514 conflict preemption, leaving them without any remedy.¹⁵² Having received benefits on termination, no longer employed, and without expectations of returning to covered employment, early retirees do not qualify as participants under ERISA. By rejecting the “but for” test for standing, they are precluded from filing a claim in federal court, thereby requiring their case to be remanded back to state court where they will be on a collision course with the broad sweep of ERISA conflict preemption. The impact of these decisions leaves former employees with no recourse in either federal or state court. The same result could occur in an action based on diversity jurisdiction.¹⁵³

A. Lack of an ERISA Remedy Does Not Affect Conflict Preemption at the State Level

The Tenth Circuit acknowledges the plaintiff’s lack of remedy as a “valid concern,” but not one for the federal judiciary.¹⁵⁴ This point of view is consistent with its prior decisions in which the Tenth Circuit has noted that “the unavailability of a remedy under ERISA is not germane to preemption analysis.”¹⁵⁵ *Mitchell* is a particularly bothersome opinion in that it allows the wrongdoings of employers and plan administrators to

148. *Felix*, 387 F.3d at 1160.

149. *Id.* at 1162 (citing *Cannon v. Group Health Serv. of Okla, Inc.*, 77 F.3d 1270, 1274 (10th Cir. 1996)).

150. 387 F.3d 1146 (10th Cir. 2005).

151. *See Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 466 (10th Cir. 1990); *see Raymond v. Mobil Oil Corp.*, 983 F.2d 1528–29 (10th Cir. 1993).

152. *Felix*, 387 F.3d at 1162 (noting that this opinion “leaves open the uncomfortable possibility that Plaintiffs may lack standing to sue under ERISA but will then be preempted in state court under § 514 from asserting a state claim, leaving them with no remedy”); *see Houdek v. Mobil Oil Corp.*, 879 P.2d 417 (Colo. Ct. App. 1994) (holding that plaintiff’s state law fraud claims were preempted for relating to an ERISA plan, leaving no remedy).

153. *See supra* Part III.B.

154. *Felix*, 387 F.3d at 1162.

155. *Id.* (citing *Cannon v. Group Health Serv. of Okla., Inc.*, 77 F.3d 1270, 1274 (10th Cir. 1996)).

go unchecked as long as the employee receives all of the lesser benefits to which they were entitled when duped into early termination. While courts are aware that their interpretation of the preemption clause "leaves a gap in remedies within a statute intended to protect participants in employee benefits plans," this lack of remedy did affect their analysis.¹⁵⁶

The Tenth Circuit justified this harsh result with its interpretation of congressional intent.¹⁵⁷ The court notes that Congress intended the civil enforcement mechanisms of ERISA "to be exclusive, and the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants . . . were free to obtain remedies under state law that Congress rejected in ERISA.'"¹⁵⁸ Seemingly attempting to sugarcoat the grim outcomes afforded by this decision, the court points out that this lack of a remedy is not as bad as it may initially appear.¹⁵⁹ In some factual situations, plaintiffs may be able to bring a cause of action under other subsections of 502(a) that are not of issue in the instant case; for example, cases regarding a breach of a fiduciary duty, or claims for equitable relief under the catch all provision of 502(a)(3).¹⁶⁰ However, with *Felix*, it appears that the court is unwilling to "second-guess" Congress' policy decisions, even in light of the harsh outcome or in the threat of preemption of the plaintiff's state claims.¹⁶¹

In *Cannon v. Group Health Serv. of Okla., Inc.*,¹⁶² a holding consistent with its earlier decisions, the Tenth Circuit was not persuaded that ERISA should not be allowed to preempt state causes of action if no alternative remedy is available.¹⁶³ Recognizing that this is an issue of first impression, the *Cannon* court noted that no case law supports the idea that "an exception to ERISA's express preemption clause exists when ERISA provides no remedy."¹⁶⁴ Once again asserting a refusal to rewrite ERISA, the court noted that although the Supreme Court has not ad-

156. *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir. 1992) ("While we are not unmindful of the fact that our interpretation of the preemption clause leaves a gap in remedies within a statute intended to protect participants in employee benefits plans, the lack of an ERISA remedy does not effect preemption analysis").

157. *Felix*, 387 F.3d at 1162.

158. *Id.* at 1162-63 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

159. The court in *Raymond* stated that an argument could "certainly be made that the fraud claims plaintiffs have made in this case are such 'laws of general applicability' thus falling within the recognized exception to ERISA preemption. *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1538 n.14 (10th Cir. 1993). However, upon remand the Colorado Court of Appeals held the fraud claims preempted by ERISA, leaving the former employees without a remedy. *Houdek v. Mobil Oil Corp.*, 879 P.2d 417, 421 (Colo. Ct. App. 1994).

160. *Felix*, 387 F.3d at 1163.

161. *Id.* (refusing to second-guess Congress' policy choices and holding Plaintiffs are not participants within the scope of 502(a)(1)).

162. 77 F.3d 1270 (10th Cir. 1996).

163. *Cannon*, 77 F.3d at 1272.

164. *Id.* at 1274 (noting that this is a case of first impression about whether ERISA may pre-emption state common law claims if no alternative remedy is available under ERISA; however, this fact had no bearing on the court's analysis of preemption).

dressed this issue, the Tenth Circuit has – the fact that a state law claim may be preempted does not “necessarily mandate that there be an ERISA remedy.”¹⁶⁵ Furthermore, the “proper focus for preemption analysis should be on the nature of the claim for relief, not whether a particular plaintiff has a potential remedy under ERISA.”¹⁶⁶ Finally, the Tenth Circuit insisted that “Congress, and not this court, is the appropriate forum for such policy arguments.”¹⁶⁷

B. “Uncomfortable” Possibilities: Wronged Plaintiffs Left Without Remedies

Other jurisdictions have held that ERISA preempts state law claims even if the plaintiff is left without a remedy.¹⁶⁸ One court noted that a lack of remedy does not preclude ERISA application and “ERISA preempts state law claims even if the plaintiff is left without a remedy.”¹⁶⁹ This line of judicial opinions paves the way for particularly bleak results.

In a dissenting opinion in *Sanson v. General Motors Corp.*¹⁷⁰ Judge Birch argued the case represented the “point at which the preemption tide should be stayed.”¹⁷¹ Judge Birch acknowledged that the *Sanson* opinion “favors a finding of preemption,”¹⁷² but was troubled by the contradiction between the underlying purpose of ERISA, to protect employees and beneficiaries and the decisions that are being implemented by the courts.¹⁷³ He stated, “A finding of preemption in this case not only fails to further any such protective policy, it conceivably offers an unscrupulous employer a method of avoiding employee benefit ‘burdens’ . . . and stands the entire statutory scheme on its proverbial head.”¹⁷⁴ Perhaps verbalizing the thoughts of many other judges, Judge Birch noted that he finds it “difficult to comprehend, in a common sense way, how a law enacted to protect the very class of individual into which the appellant squarely fits can be construed to deny him such a preexisting remedy.”¹⁷⁵ This judicial construction is “disappointingly pernicious to the very goals

165. *Id.*; see *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir. 1992) (“The lack of an ERISA remedy does not affect a pre-emption analysis.”); see *Cromwell v. Equicor HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991) (“Nor is it relevant to an analysis of the scope of federal preemption that appellants may be left without a remedy.”); see *Hospice of Metro Denver, Inc., v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir. 1991) (“We are aware that preemption normally is not dependent on the availability of ERISA remedies.”).

166. *Cannon*, 77 F.3d at 1275.

167. *Id.* at 1274.

168. See Zanglein, *supra* note 37, at 673.

169. *Id.* (citing *Dockter v. Aetna Life Ins. Co.*, No. 91-56029, 1993 WL 55150, at *2 (9th Cir. March 3, 1993), *cert. denied*, 114 S.Ct. 310 (1993)).

170. 966 F.2d 618 (11th Cir. 1992).

171. *Sanson*, 966 F.2d at 623 (Birch, J., dissenting).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 623 n.2.

and desires that motivated" what Congress set out to accomplish in the first place.¹⁷⁶

Another case with a harsh outcome is *Olson v. General Dynamics Corp.*¹⁷⁷ Here, the Ninth Circuit found that because the Supreme Court has interpreted ERISA's preemption provision so broadly, it was "difficult to see how Olson's fraud claim could be found not to 'relate to' an employee benefit plan."¹⁷⁸ In his concurrence, Judge Reinhardt noted that: "[b]ecause of the passage of ERISA, Olson is left without a remedy. Unfortunately his fate is not unique."¹⁷⁹

In *Aetna Health Inc., v. Davila*,¹⁸⁰ acknowledging that the Court's decision was consistent with governing case law, Justice Ginsburg joined the decision of the Court, but at the same time joined the "judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime."¹⁸¹ Noting that plaintiffs "adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief,"¹⁸² Justice Ginsburg, appealed to Congress for "fresh consideration" of the availability of damages and remedies under ERISA.¹⁸³

As illustrated above, the ERISA statute, initially designed to safeguard employee retirement benefit plans, has, "all too frequently, been used to deprive employees of rights they previously enjoyed under state law"¹⁸⁴ Allowing employers to engage in outright fraud without legal consequences – so long as the former employees received all benefits that had vested by the time of their departure, it is of no moment that they were told a lie to get them to retire early mocks that purpose.

C. The Former Employee Fraud Cases Present a Conflict Ripe for Supreme Court Resolution

The Supreme Court has not yet addressed the issue of whether the "but for" test for standing will afford former employees participant standing under ERISA. Whether the Supreme Court will side with the

176. Acker, *supra* note 5, at 285 (citing *Sanson*, 966 F.2d at 625 (Birch, J., dissenting)).

177. 960 F.2d 1418 (9th Cir. 1991).

178. *Olson v. Gen. Dynamics Corp.*, 960 F.2d 1418, 1421 (9th Cir. 1991).

179. *Id.* at 1423 (Reinhardt, J., concurring).

180. 542 U.S. 200 (2004).

181. *Davila*, 542 U.S. at 222. (quoting *Difelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring)) (alteration in original).

182. *Id.* (noting a "regulatory vacuum" exists where "virtually all state law remedies are preempted").

183. *Id.* at 223. "[The] '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.'" *Id.* (quoting *Cicio v. Does*, 321 F.3d 83, 106, 107 (2nd Cir. 2003)). "The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable." *Id.* (quoting *Difelice*, 346 F.3d at 467).

184. Zanglein, *supra* note 37, at 713.

majority or minority views depends on how it views its own *Firestone Tire & Rubber Co. v. Birch*¹⁸⁵ decision.

If the Court narrowly construes the definition of participant, as applied to former employees, to include only those with either a reasonable expectation of returning to covered employment or a colorable claim to vested benefits, the minority view will likely be validated.¹⁸⁶ However, if the Court adopts a more expansive concept of participation, former employees would not be deprived of participant standing and status to sue under ERISA.¹⁸⁷

The Court has had the opportunity to interpret the definition of participant under ERISA in *Firestone*. The Court, in a sense, rejected the “but for” test for standing by holding that one can only be a participant under the definition provided by the statute, if she has a reasonable expectation of returning to covered employment, or if she can show a colorable claim to vested benefits.¹⁸⁸ This would seem to exclude all former employees, fraudulently induced into early retirement, that have received their benefits, even though those benefits were results of misrepresentation.

The Supreme Court’s opinion in *Varity Corp. v. Howe*¹⁸⁹ addresses former employees who claimed to be defrauded.¹⁹⁰ The *Varity* plaintiffs were considered participants or beneficiaries under the plan and were suing for equitable relief to redress a fiduciary violation.¹⁹¹ At first glance it looks like the Supreme Court might be amenable to a “but for” test, however, this case is qualitatively different in several respects. The principal differences are: (1) the plaintiffs were reinstated as participants in their plan; (2) the plaintiffs had a colorable claim for vested benefits because they did not receive the benefits promised; and (3) the plaintiffs brought their cause of action under ERISA Section 502(a)(3) for a breach of fiduciary duty.¹⁹²

D. Finding Justice for Defrauded Employees

The plight of these fraud victims, stranded without a remedy, violates the basic principle: for every wrong there is a remedy. Current judicial opinions subvert the original purpose of ERISA – to protect employee rights and provide a uniform regulatory scheme for employee

185. 489 U.S. 101 (1989)

186. See *Felix v. Lucent Techs.*, 387 F.3d 1146, 1159 (10th Cir. 2004).

187. *Vartanian v. Monsanto Co.*, 14 F.3d 697, 703 (1st Cir. 1994).

188. *Firestone*, 489 U.S. at 117.

189. 516 U.S. 489 (1996).

190. *Varity*, 516 U.S. at 494 (noting that the district court found that Varity and Massey, acting as ERISA fiduciaries had harmed the plan’s beneficiaries through deliberate deception).

191. *Id.* at 507 (noting that Varity concedes that plaintiffs are participants or beneficiaries).

192. *Id.* at 494–95 (noting the district court ordered Massey to reinstate its former employees into its own plan); see also 29 U.S.C. § 1104(a)(1) (2005).

welfare and pension plans.¹⁹³ It does not seem possible that by enacting ERISA, Congress intended to allow a wrongdoer to profit from his wrongdoing; however, this is precisely what is happening in the case of many former employers fraudulently induced into early retirement.¹⁹⁴ This is a serious anomaly that demands a solution and is “begging for congressional or judicial repair.”¹⁹⁵

1. Congressional Reform

The most direct paths through ERISA’s preemption thicket would be congressional amendments.¹⁹⁶ Congress should narrow Section 514 preemption to allow state remedies where employer/plan administrator wrongdoing is involved. There should be no preemption when an employer/plan administrator manipulates the plan, or misrepresents to its employees the benefits that will or will not be available to them in the future, thereby inducing employee reliance. Congress “must exempt from ERISA’s preemption provision unfair claims practices regulated by state insurance law, tort claims of fraudulent misrepresentation, and tort claims of negligence relating to the administration of an employee benefit plan.”¹⁹⁷

Additionally, Congress can rectify the lack of remedies available to former employees by modifying ERISA to permit remedies under Section 502 in situations involving extra-contractual and punitive damages.¹⁹⁸ This would allow former employees to recover the benefits they would have been entitled to, had they not been lied to. Without these modifications to ERISA, the wrongdoings of employers, plan administrators, and insurers will not be adequately deterred.¹⁹⁹

Many members of the judiciary are urging a congressional fix. Judge Becker, in *Difelice v. Aetna*, ordered the clerk of the Third Circuit Court of Appeals to send his concurrence to the Solicitor of the Department of Labor, urging congressional reform of ERISA.²⁰⁰ Judge Becker is concerned that ERISA’s failure to change with the times has “rendered it incapable of protecting employees;” therefore, Congress must act

193. See Zanglein, *supra* note 37, at 713

194. See *Id.*

195. Robert Simpson, Note and Commentary, *Another Trip into the Great Swamp: The Seventh Circuit’s Preemption of Illinois Unclaimed Property Act under ERISA*, 7 CONN. INS. L.J. 227, 229 (2000).

196. Jane D. Bailey, *Tenth Circuit Survey: ERISA Preemption*, 74 DENV. U. L. REV. 473, 473 (1997) (stating “[a]ny court forced to enter the ERISA preemption thicket sets out on a treacherous path.”) (quoting *Gonzales v. Prudential Ins. Co.*, 901 F.2d 446, 451–52 (5th Cir. 1990)).

197. Zanglein, *supra* note 37, at 713.

198. *Id.* at 722.

199. *Id.*

200. Shannon P. Duffy, *Becker Calls on Congress, Justices to Fix ERISA*, LEGAL INTELLIGENCER, Oct. 16, 2003, at 1 (noting Judge Becker sent his opinion to the Senate Committee on Health, Education, Labor and Pensions, the House Committee on Education of the Workforce, committee chairs, and the ranking members, chief majority counsel, and the minority counsel of both Houses).

without haste in attempting to “prevent further injustice.”²⁰¹ Judge Becker acknowledges that ERISA included a detailed plan for its protection of pension plans; however, it has fallen short in its protection of welfare plans, particularly health insurance.²⁰² He notes that although welfare plans are subject to less regulation than pension plans, ERISA’s preemption provisions apply equally to both welfare and pension plans,²⁰³ resulting in a complete bar from state law for many workers’ claims that relate to their health insurance.²⁰⁴ Judge Becker finds it “unlikely that Congress intentionally created this so-called ‘regulatory vacuum,’ in which it displaced state-law regulation of welfare benefit plans providing no federal substitute.”²⁰⁵

2. Judicial Redirection

The courts cannot rewrite ERISA, but they can examine congressional intent more closely. Allowing a fraud-feasor protection from fraud is not a way to make benefits more widely available, and this is surely not an original congressional intent.²⁰⁶ Congress originally intended that courts should adopt broad remedies to restore ERISA violations, while providing “the full range of legal and equitable remedies available in both state and federal courts”²⁰⁷ A look at legislative history shows that Congress intended federal courts “to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though the remedies may not be specifically mentioned in ERISA itself.”²⁰⁸

Because of the lack of remedies available to plaintiffs, a growing minority of courts have found an “insufficient relationship between the claim and an ERISA plan to trigger preemption, thus leaving state law remedies [intact].”²⁰⁹ Additionally, some courts have even fashioned common-law ERISA remedies that duplicate the preempted state law remedy.²¹⁰

The Court needs to rethink its interpretation of ERISA’s preemption provisions, and could reconsider that its prior holdings all allow for the possibility of recovering compensatory damages.²¹¹ The Supreme Court

201. *Id.* (discussing Judge Becker’s concurrence in *Difelice*, 346 F.3d 442 (2003)).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *See* Zanglein, *supra* note 37, at 718

207. *Id.* (quoting H.R.REP. No. 93-533 (1974), as reprinted in 1974 U.S.C.C.A.N. 4639, 4655).

208. *Id.* (quoting H.R. REP NO. 101-247, pt.1. (1989)).

209. *Acker*, *supra* note 5, at 290; *see, e.g.,* Taumajian v. Frailey, 135 F.3d 648, 656 (9th Cir. 1998); *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1407 (11th Cir. 1994).

210. *Acker supra* note 5, at 290; *see Cisneros v. Unum Life Ins. Co. of America*, 134 F.3d 939 (9th Cir. 1998); *Ingersoll Rand v. McClendon*, 498 U.S. 133 (1990).

211. *Duffy, supra* note 200 (discussing Judge Becker’s concurrence in *Difelice*, 346 F.3d 442 (2003)).

needs to take a more active role “in reconciling conflicts between the circuits and in filling in the congressionally created interstices by some consistent, fair and logical jurisprudence.”²¹²

3. State Action

ERISA’s Savings Clause exempts from conflict preemption those state laws, whether statutory or decisional, that regulate insurance.²¹³ States can pass laws that regulate insurance without falling victim to ERISA preemption.²¹⁴ Additionally, state legislatures can pass laws that regulate insurance to make relief more widely available. “[B]ecause most areas of insurance ‘relate to’ employee benefit plans in some way and would fall under general ERISA preemption, the Insurance Savings Clause was necessary to avoid preemption of all state insurance laws.”²¹⁵ This is not a new remedy but allows more rights by proscribing what insurers can and can not do.²¹⁶ State laws can provide that health insurance must provide a certain set of requirements.²¹⁷ This can help make ERISA less harsh.²¹⁸ States should enact legislation to make the appellate process more hospitable for plaintiffs.

State insurance regulators have already taken action to impose policy changes and pass regulations that will allow claimants new rights.²¹⁹ California recently announced that it would fine UnumProvident (the nation’s largest disability insurer) \$8 million, require the company to reopen more than 26,000 California cases, and that it alter its policies in the state to provide for “greater consumer protections.”²²⁰ For example, California plans to require UnumProvident to change its language in all new California policies, and “force the company to remove limitations on benefits for ‘self reported’ conditions such as migraine headaches”²²¹

Without legislative reform at the federal or state level, Congress’ original intent to safeguard the rights of employees participating in ERISA plans will be undermined, and in many cases, plaintiffs will be left without a remedy. In addition, California will require Unum to re-

212. Acker, *supra* note 5, at 286; see *Davila*, 542 U.S. at 208 (Ginsburg, J., concurring).

213. 29 U.S.C.S. § 1144(b)(2)(A) (2005) (stating in the Insurance Savings Clause that no part of ERISA “shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities”); see *Ky. Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 336 n.1 (2003).

214. Matthew O. Gatewood, *The New Map: The Supreme Court’s Guide to Curing Thirty Years of Confusion in ERISA Savings Clause Analysis*, 62 WASH. & LEE L. REV. 643, 648 (2005).

215. *Id.* at 649.

216. *See id.*

217. *Id.* at 648.

218. *See id.*

219. See Peter G. Gosselin, *State Fines Insurer, Orders Reforms in Disability Cases*, L.A. TIMES, Oct. 3, 2005, at A1.

220. *Id.*

221. *Id.*

strict its usage of a twenty four-month limitation on benefits for “mental and nervous conditions.”²²² The California State Insurance Department has stated that it will discuss these new requirements with other disability insurers and will “take regulatory action against those who refuse to adopt the policy changes.”²²³

CONCLUSION

In rejecting the “but for” test for standing under ERISA in *Felix v. Lucent Technologies, Inc.*,²²⁴ the Tenth Circuit allowed for what it termed the “uncomfortable” possibility that former employees, defrauded into leaving their jobs and without standing to sue under ERISA, will be faced with loss of any remedy in state court by the expansive conflict preemption of Section 514. As a consequence, the plan administrator or employer may commit wrongdoings that will go unpunished in a court of law. The majority of jurisdictions have avoided this unfair consequence by allowing the “but for” test for standing under ERISA in situations where a former employee is attempting to file suit.

An employee’s decision to retire in the unforeseen presence of fraud is not an informed decision and is a wrong that should be remedied in the courts. The lack of remedy in these types of situations is ironic; ERISA was designed to shield participant’s rights, but has instead become the employer’s sword, destroying all rights regarding conduct that are deemed to “relate to” an ERISA plan.²²⁵ ERISA was designed to protect participants, not to provide immunity to those who would defraud them.²²⁶

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222. *Id.* (noting that UnumProvident had repeatedly been accused of wrongly categorizing claimants as suffering from such conditions to reduce what it must pay them).

223. *Id.* (“What we are saying to any company operating in this area of insurance . . . is it has to stop screwing people”).

224. 387 F.3d 1146 (10th Cir. 2005).

225. President Ford summed up ERISA when he signed it into law on Labor Day 1974, “This legislation will alleviate the fears and the anxiety of people who are on the production lines or in the mines or elsewhere, in that they now know that their investment in private pension funds will be better protected.” Donald L. Barlett & James B. Steele, *The Broken Promise*, TIME, Oct. 31, 2005, at 32, 42.

226. See *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1329, 1333 (5th Cir. 1992).

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