obeyed by a plaintiff in a non-English court.

It is undisputed that plaintiffs did not mail service from England, and did not comply with other applicable English civil procedure rules relevant to mail service in English courts. Plaintiffs mailed a summons and complaint prepared by their counsel rather than a "claim form" issued by an English court. They mailed it from an American mailbox instead of an English postbox. They filed no certificate of service in an English court. In sum, in mailing an American complaint from a mailbox in the United States, the plaintiffs did not—and could not—comply with the English rules governing service by "first class post" for suits in English courts.

C. Purpose of Rule 4(f)(2)(A)

The 1963 Committee Notes accompanying Rule 4(i)(1)(A), the predecessor to Rule 4(f)(2)(A), state that the purpose of the rule is to provide an alternative method of service "that is likely to create least objection in the place of service." *See also Grand,* 988 F.2d at 487; Ronan E. Degnan and Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants,* 39 Hastings L.J. 799, 840 (1988) ("[T]he approach [of Rule 4(i)(1)(A)] assures that the receiving state can have no objection to the means of transmitting notice.").

From the exchange between the British Embassy and the United States State Department, it is clear that an interpretation of Rule 4(f)(2)(A) permitting service of process on an English defendant by ordinary first class mail sent from the United States is not "likely to create least objection in the place of service." Rather, this exchange shows us that such an interpretation is likely to create a *substantial,* and in my view entirely justified, "objection in the place of service."

V. Conclusion

Today's decision will cause mischief at home and unhappiness abroad. I agree with the majority's conclusion that Article 10(a) of the Hague Convention does not "interfere" with service by mail. But I strongly disagree with its conclusion that Rule 4(f)(2)(A) authorizes service of process by international mail. Not only is the existing case law uniform in holding that service by international mail is not authorized under Rule 4(f)(2)(A). There is also no need to depart from this consistent understanding of the rule, for a competent attorney already has ample means of serving process on a foreign defendant under Rule 4(f) without relying on the extraordinary expedient of ordinary international first class mail.

PROVIDENCE HEALTH PLAN, an Oregon non-profit corporation, Plaintiff–Appellant,

v.

Gary McDOWELL; Roselea McDowell, Defendants–Appellees.

Providence Health Plan, an Oregon non-profit corporation, Plaintiff–Appellant,

v.

Gary McDowell; Roselea McDowell, Defendants–Appellees.

Nos. 02–35263, 02–35841.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 5, 2003.

Filed March 24, 2004.

Background: Insurer filed two actions to recover benefits paid to insureds under

health care plan selected by their employer. The United States District Court for the District of Oregon, John Jelderks and Thomas M. Coffin, United States Magistrate Judges, dismissed removed state court breach of contract action as completely preempted under Employee Income Retirement Security Act (ERISA) and dismissed federal action for equitable relief under ERISA. Insurer appealed.

Holdings: The Court of Appeals, Brunetti, Circuit Judge, held that:

(1) breach of contract action was not removable as it did not have requisite connection with or reference to ERISA plan and did not fall within ERISA's civil enforcement provision;

(2) federal suit was barred by claim preclusion; and

(3) insurer failed to state claim under ERISA civil enforcement provision.

Affirmed in part and reversed and remanded in part.

1. Federal Courts ⚷776

Court of Appeals reviews dismissal for failure to state a claim upon which relief could be granted and determination of subject matter jurisdiction de novo. Fed. Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Removal of Cases ⚷25(1)

In order to be removable to federal court, claim concerning plan governed by ERISA must be preempted by ERISA and must fall within scope of ERISA's enforcement provisions. 28 U.S.C.A. § 1441(b); Employee Retirement Income Security Act of 1974, §§ 502(a), 514(a), 29 U.S.C.A. §§ 1132(a), 1144(a).

3. Pensions ⚷22

States ⚷18.51

Common law claim "relates to" employee benefit plan governed by ERISA if it has connection with or reference to such a plan. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Pensions ⚷22

States ⚷18.51

In evaluating whether common law claim has "reference to" plan governed by ERISA, focus is whether claim is premised on existence of ERISA plan, and whether existence of plan is essential to claim's survival. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Pensions ⚷22

States ⚷18.51

In determining whether claim has "connection with" employee benefit plan, relationship test is used; specifically, emphasis is on genuine impact that action has on relationship governed by ERISA, such as relationship between plan and participant. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

See publication Words and Phrases for other judicial constructions and definitions.

6. Removal of Cases ⚷25(1)

Health insurer's state court action against insureds under health care plan selected by their employer, for breach of insurance contract's reimbursement clause, was not removable to federal court; action did not have requisite connection with or reference to ERISA plan and did not fall within ERISA's civil enforcement provision. 28 U.S.C.A. § 1441; Employee Retirement Income Security Act of 1974,

§§ 502(a), 514(a), 29 U.S.C.A. §§ 1132(a), 1144(a).

7. Judgment ⇐584

Claim preclusion bars any lawsuits on any claims that were raised or could have been raised in prior action.

8. Judgment ⇐540

Claim preclusion applies if there is (1) identity of claims, (2) final judgment on the merits, and (3) identity or privity between parties.

9. Judgment ⇐570(5), 585(2)

Claim preclusion barred insurer's federal action against insureds under health care plan selected by their employer for equitable relief under ERISA's civil enforcement provision; ERISA claim should have been brought in previous state court breach of contract litigation that was removed to federal court and dismissed for preemption. Employee Retirement Income Security Act of 1974, § 502(a), 29 U.S.C.A. § 1132(a).

10. Pensions ⇐87

In determining whether action for equitable relief is properly brought under ERISA, courts evaluate substance of remedy sought rather than label placed on that remedy. Employee Retirement Income Security Act of 1974, § 502(a)(3)(B), 29 U.S.C.A. § 1132(a)(3)(B).

11. Pensions ⇐87

Insurer's action for equitable relief failed to state claim under ERISA's civil enforcement provision; although insurer alleged it was entitled to specific performance of reimbursement provision under insurance contract because it did not have adequate legal remedy, district court concluded that insurer was in reality seeking monetary relief despite couching its request in equity. Employee Retirement Income Security Act of 1974, § 502(a)(3)(B), 29 U.S.C.A. § 1132(a)(3)(B).

William F. Gary, Sharon A. Rudnick, Arden J. Olson, Harrang Long Gary Rudnick, P.C., Eugene, OR, for the plaintiff-appellant.

Gordon T. Carey, Jr., Portland, OR, for the defendants-appellees.

Appeal from the United States District Court for the District of Oregon, John Jelderks, Magistrate Judge, Presiding, Thomas M. Coffin, Magistrate Judge, Presiding, D.C. Nos. CV–01–01704–JE, CV–02–06110–TC.

Before BRUNETTI, T.G. NELSON, and GRABER, Circuit Judges.

OPINION

BRUNETTI, Circuit Judge.

These appeals concern two actions by Providence Health Plan to recover benefits paid to its insureds, the McDowells. The first action, "*McDowell I,*" was for breach of contract and was filed in state court. *McDowell I* was removed to federal court and dismissed as completely preempted under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* The second action, "*McDowell II,*" was filed in federal court as an action for equitable relief under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). This action was also dismissed after the district court determined that Providence failed to state a claim under § 1132(a).

For the following reasons, we reverse the dismissal of *McDowell I,* but affirm as to *McDowell II.*

BACKGROUND

In February of 1990, Gary McDowell applied for health coverage through SelectCare Health Plans, the health care insurance plan selected by his employer. Roselea McDowell, Gary's spouse, is covered under the same policy. The McDowells' policy was renewed every year thereafter with SelectCare and then, after SelectCare's 1997 merger with Providence, with both SelectCare and Providence. In January of 2000, the insurance policy was issued only through Providence.

The McDowells' insurance contract with Providence contains the following reimbursement provision:

> Providence Health shall be entitled to the proceeds of any settlement, whether or not responsibility is accepted or denied by the third party for the condition, or any judgment that results in a recovery from a third party, up to the amount of benefits paid by Providence Health Plan for the condition, less a proportionate share of reasonable attorney fees, whether such benefits are paid by Providence Health Plan before or after the settlement or recovery.

On February 13, 2000, the McDowells were injured in an automobile accident. Providence paid benefits of $18,741.81 for Gary's medical care and $13,687.37 for Roselea's care.

On May 25, 2000, the McDowells each signed agreements directing their attorney to reimburse Providence for benefits paid in the event of any recovery from a third party.

The McDowells sued the driver of the vehicle that hit them as well as the driver's employer. In February of 2001, the McDowells received a settlement for approximately $500,000.

Following the settlement, Providence unsuccessfully sought reimbursement from the McDowells in the amount of $21,727.55 under the insurance contract's reimbursement clause.

In October of 2001, Providence filed its first action against the McDowells in Linn County Circuit Court, alleging breach of contract. According to Providence, the McDowells agreed, in their insurance contract, that if they received money through any recovery action, they would reimburse Providence for the full value of benefits paid by Providence, less reasonable attorneys' fees. Providence contended that it was entitled to $21,727.55 pursuant to this provision.

The McDowells removed the contract action to federal court and filed a motion to dismiss, contending that the claim was preempted by ERISA. Providence filed a motion to remand.

On January 29, 2002, the district court denied the motion to remand and granted the McDowells' motion. The district court held that it had removal jurisdiction and that ERISA preemption barred Providence's claim.

In response to this dismissal, on April 12, 2002, Providence brought its second action in the United States District Court for the District of Oregon, this time under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). In this second case, Providence alleged that it was entitled to the equitable remedy of specific performance under § 1132(a)(3)(B) because it did not have an adequate legal remedy. Specifically, Providence sought an order mandating the McDowells to specifically perform the reimbursement provision under the insurance contract.

On August 28, 2002, the district court dismissed this second action, concluding that Providence was in reality seeking monetary relief despite couching its request in equity.

Providence timely appealed both dismissals, and both are presently before this court.

DISCUSSION

A. Standard of Review

[1] We review a dismissal under Federal Rule of Civil Procedure 12(b)(6) and a determination of subject matter jurisdiction de novo. *Homedics, Inc. v. Valley Forge Ins. Co.,* 315 F.3d 1135, 1138 (9th Cir.2003); *FMC Med. Plan v. Owens,* 122 F.3d 1258, 1260 (9th Cir.1997).

B. McDowell I

On appeal, Providence contends that the district court lacked removal jurisdiction over their breach of contract action.

[2] In order to be removable to federal court, a claim concerning a plan governed by ERISA must be preempted by ERISA and must fall within the scope of ERISA's enforcement provisions. *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 62–66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *see also Toumajian v. Frailey,* 135 F.3d 648, 654 (9th Cir.1998).

ERISA's preemption provision, 29 U.S.C. § 1144(a), provides that ERISA's provisions shall generally "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." While this section suggests that the phrase "relate to" should be read broadly, the Supreme Court has recently admonished that the term is to be read practically, with an eye toward the action's actual relationship to the subject plan. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 655–56, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (stating that "infinite relations cannot be the measure of preemption" in construing "relate to").

[3] Generally speaking, a common law claim "relates to" an employee benefit plan governed by ERISA "if it has a connection with or reference to such a plan." *Id.* (internal quotation marks omitted); *see also Blue Cross of Cal. v. Anesthesia Care Assocs. Med. Group, Inc.,* 187 F.3d 1045, 1052 (9th Cir.1999).

[4] In evaluating whether a common law claim has "reference to" a plan governed by ERISA, the focus is whether the claim is premised on the existence of an ERISA plan, and whether the existence of the plan is essential to the claim's survival. If so, a sufficient "reference" exists to support preemption. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.,* 519 U.S. 316, 324–25, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (citing *Ingersoll–Rand Co. v. McClendon,* 498 U.S. 133, 140, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)).

[5] In determining whether a claim has a "connection with" an employee benefit plan, courts in this circuit use a relationship test. Specifically, the emphasis is on the genuine impact that the action has on a relationship governed by ERISA, such as the relationship between the plan and a participant. *See Abraham v. Norcal Waste Sys., Inc.,* 265 F.3d 811, 820–21 (9th Cir.2001); *Blue Cross of Cal.,* 187 F.3d at 1052–53.

[6] Here, the district court determined that the breach of contract action related to an ERISA plan because it sought the enforcement of a plan provision, the reimbursement provision. The district court erred in this respect because Providence's action for breach of contract does not have the requisite "connection with" or "reference to" an ERISA plan. Providence is simply attempting, through contract law,

to enforce the reimbursement provision. Adjudication of its claim does not require interpreting the plan or dictate any sort of distribution of benefits. Providence has already paid ERISA benefits on behalf of the McDowells, and they are not disputing the correctness of the benefits paid. Rather, Providence claims that the McDowells have breached two promises: (a) the reimbursement provision incorporated into their ERISA plan, as it applies to monies paid to them by a non-ERISA third party, and (b) their agreement to direct their lawyer to reimburse Providence in the event of a settlement. Because this is merely a claim for reimbursement based upon the third-party settlement, it does not "relate to" the plan. *See Blue Cross of Cal.,* 187 F.3d at 1053–54 (holding action for reimbursement between insurers and medical providers not preempted, in part because the claims did not require construction of the subject plan's terms).

Also, Providence's breach of contract action fails the second requirement of removal jurisdiction because it does not fall within ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). As a fiduciary to the plan, Providence's only vehicle for relief in addressing violations or seeking enforcement of a plan is § 1132(a)(3). However, that section allows a fiduciary to seek only equitable relief for violation of the plan. Here, Providence is seeking ordinary damages—monetary relief—based upon contractual remedies that arise under state law. Therefore, its claim is not within ERISA's civil enforcement provisions. *Abraham,* 265 F.3d at 824.

Our conclusion is further buttressed by a recent Supreme Court decision and prior decisions of this circuit dismissing ERISA actions brought by insurers for reimbursement of benefits.

Most recently, in *Great–West Life & Annuity Insurance Co. v. Knudson,* 534 U.S. 204, 220, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), the Supreme Court concluded that § 1132(a)(3) did *not* authorize a fiduciary to enforce a reimbursement provision and acknowledged that other remedies outside ERISA might be available to the fiduciary. Further, the Court left open the issue that we decide today: "whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would [be] pre-empted by ERISA." *Id.*

Previous decisions of this circuit concerning reimbursement actions by insurers are also consistent with *Great–West* and foretold our decision with regard to such actions. *See, e.g., Cement Masons Health & Welfare Trust Fund for N. Cal. v. Stone,* 197 F.3d 1003, 1007 (9th Cir.1999); *Owens,* 122 F.3d at 1262 & n. 2. In both cases, this court held that insurance companies could not look to ERISA's provisions allowing equitable relief to obtain reimbursement from their insureds. *See Cement Masons,* 197 F.3d at 1007 (recognizing implicitly, in dismissing an insurance company's ERISA claim for equitable relief, that there may be other theories outside ERISA to seek relief from the insured); *Owens,* 122 F.3d at 1262 & n. 2 (dismissing insurer's claims for reimbursement under § 1132(a)(3), and specifying that "FMC will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement").

Because Providence's breach of contract claim is not preempted under § 1144 and does not fall within the scope of § 1132(a), the district court lacked removal jurisdiction, and the case must be remanded to state court.

C. McDowell II

Following dismissal of *McDowell I,* Providence brought a suit in federal court under 29 U.S.C. § 1132(a)(3) seeking specific performance of the reimbursement

provision. The district court rejected Providence's "lawyerly inventiveness" and dismissed Providence's action, stating that "Plaintiff's ERISA action, brought 'in equity' but seeking monetary relief, cannot proceed."

For the following reasons, the district court is affirmed.

1. Claim Preclusion

[7, 8] Claim preclusion bars any "lawsuits on 'any claims that were raised *or could have been raised*' in a prior action." *Stewart v. U.S. Bancorp,* 297 F.3d 953, 956 (9th Cir.2002) (quoting *Owens v. Kaiser Found. Health Plan, Inc.,* 244 F.3d 708, 713 (9th Cir.2001)). Claim preclusion applies if there is " '(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties.' " *Id.* (quoting *Kaiser Found. Health Plan, Inc.,* 244 F.3d at 713).

[9] All three requirements are met here. First, the two actions clearly involved the same parties disputing the same contractual provision. Additionally, a finding of preemption is a final judgment on the merits. *Id.* at 956–57 (holding that the plaintiffs' ERISA claims should have been brought in the previous state court litigation that was removed and dismissed for preemption, rather than in a subsequent federal proceeding).

Accordingly, this action is barred under claim preclusion.

2. Failure to State ERISA Claim

[10] ERISA authorizes fiduciaries to bring suit in federal court for "appropriate equitable relief" to remedy violations of a plan or to enforce its provisions. 29 U.S.C. § 1132(a)(3)(B). In determining whether an action for equitable relief is properly brought under ERISA, courts evaluate "the' substance of the remedy sought ... rather than the label placed on that remedy.' " *Westaff (USA) Inc. v. Arce,* 298 F.3d 1164, 1166 (9th Cir.2002) (quoting *Watkins v. Westinghouse Hanford Co.,* 12 F.3d 1517, 1528 n. 5 (9th Cir.1993)), *cert. denied,* 537 U.S. 1111, 123 S.Ct. 901 (2003).

[11] The district court was correct in concluding that Providence's claim lay outside the scope of § 1132(a)(3). While Providence terms this an action in equity for specific performance, at bottom, Providence is simply attempting to enforce a contractual obligation for repayment. This is "a classic action at law and not an equitable claim." *Id.* As has been noted by this court before in the context of § 1132, "[a]lthough they often dance around the word, what petitioners in fact seek is ... monetary relief for all losses their plan sustained as a result of the alleged breach of the reimbursement provision." *Id.* (internal quotation marks omitted).

As noted above, the Supreme Court in *Great–West* recently confirmed that the damages Providence seeks are unobtainable under ERISA's enforcement provision. In reaching this conclusion, the Court explained that, regardless of the chosen label, such monetary reimbursement constitutes legal rather than equitable relief:

> The basis for petitioners' claim is ... that petitioners are contractually entitled to *some* funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents.

534 U.S. at 214, 122 S.Ct. 708.

In that passage, *Great–West* squarely resolves that Providence's claim for monetary damages against the McDowells is a

claim for a legal remedy, despite Providence's attempt to disguise its claim in equitable clothes. *See also Westaff,* 298 F.3d at 1166–67 (declining to construe fiduciary's claim for money damages held in escrow account as a claim for equitable relief under ERISA).

CONCLUSION

For the foregoing reasons, we REVERSE the district court's dismissal of *McDowell I,* and remand with instructions to remand *McDowell I* to state court, and AFFIRM the district court's dismissal of *McDowell II.*

UNITED STATES of America, Plaintiff–Appellee,

v.

Alfred J. KOONIN, Defendant–Appellant.

No. 02–50350.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 6, 2003.

Filed March 25, 2004.

Background: Defendant was convicted in the United States District Court for the Southern District of California, Napoleon A. Jones, J., of conspiracy to travel and cause others to travel in foreign commerce in commission of murder-for-hire. Defendant appealed.

Holding: The Court of Appeals, Rawlinson, Circuit Judge, held that, as matter of first impression, statute of limitations began to run on day following day of last overt act in furtherance of conspiracy.

Affirmed.

1. Criminal Law ⚷1030(3)

Court of Appeals could consider defendant's claim that government failed to comply with statute of limitations in prosecution for conspiracy to travel and cause others to travel in foreign commerce in commission of murder-for-hire, even though it was not raised at trial, since government was not prejudiced thereby. 18 U.S.C.A. §§ 1958(a), 3282.

2. Criminal Law ⚷1139

When statute of limitations began to run is question of law typically reviewed de novo.

3. Criminal Law ⚷145.5

Government's failure to comply with statute of limitations is affirmative defense that is generally waived if not raised at trial.

4. Criminal Law ⚷150

Even if last overt act of conspiracy to travel and cause others to travel in foreign commerce in commission of murder-for-hire occurred when codefendant shot at intended victim, and conspiracy ended later that day when codefendant was arrested, five-year statute of limitations did not begin to run until next day. 18 U.S.C.A. §§ 1958(a), 3282.

5. Criminal Law ⚷155

Day of offense is excluded when determining trigger date for statute of limitations.

Leo Branton, Jr., Los Angeles, CA, for the defendant-appellant.